TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 590.

J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, ET AL., APPELLANTS,

vs.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS VIVIAN COTTON MILLS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

FILED OCTOBER 9, 1921.

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INDEX.

1 *Transcript of record.*

Supreme Court of the United States.

October Term, 1921.

J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, and Claude Moser, Deputy Collector of Internal Revenue, appellants,
vs.
JOHN J. GEORGE, TRADING AND DOING BUSINESS as Vivian Cotton Mills, and Vivian Spinning Company.

Appeal from the District Court of the United States for the Western District of North Carolina.

Filed October , 1921.

2A UNITED STATES OF AMERICA, *Set.:*

Be it remembered that heretofore, to wit, on the 7th of July, 1921, a bill of complaint was filed in the office of the clerk of the District Court of the United States for the Western District of North Carolina, at Greensboro, North Carolina, in the case wherein John J. George, trading and doing business as Vivian Cotton Mills, and Vivian Spinning Company are plaintiffs, and J. W. Bailey, collector of internal revenue, and Claude Moser, deputy collector of internal revenue, are defendants.

Said bill of complaint, filed July 7, 1921, is in words and figures as follows, to wit:

2 UNITED STATES OF AMERICA,
Western District of North Carolina.

In the United States District Court, at Charlotte.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS VIVIAN Cotton Mills, and Vivian Spinning Company,
against
J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, AND CLAUDE Moser, deputy collector of internal revenue, defendants. } Bill.

In equity.

Your petitioners respectfully showeth to the court:

One.—That your petitioner, John J. George is a resident of the State of North Carolina, of the Western District, and was a resident of said State and district in the year 1919, and at that time was engaged in the textile business, manufacturing cotton yarns, at Cherryville, North Carolina, doing business under the name and style of Vivian Cotton Mills.

Two.—That your petitioner, Vivian Spinning Company, is a corporation organized and existing under the laws of the State of North Carolina, with its principal place of business in the Western District of said State, same being in Cherryville, Gaston County. That this petitioner was organized for the purpose of and did, in the year 1921, take over the property of and the business of and is now the owner and possessor of the property known as the Vivian Cotton Mills.

Three.—That the defendant, J. W. Bailey, is collector of internal revenue for the Fourth District of the United States, residing at Raleigh, North Carolina, and the defendant, Claude Moser, one of his deputies, is a resident of Gastonia, in the Western District of North Carolina.

Four.—That your petitioner and complainant, John J. George, was the owner of and operating the Vivian Cotton Mills and engaged in the manufacture of cotton yarns and the sale of the product of the mill during the years of 1919 and 1920. That by an assessment dated November 9, 1920, the Commissioner or Acting Commissioner of Internal Revenue of the United States at Washington, District of Columbia, attempted to assess the sum of $2,098.06, due November 19, 1920, with a penalty of five percent, with interest at one percent per month from due date until paid, against this petitioner and against the property of your petitioner, Vivian Spinning Company, and has ordered that the defendant, Bailey, collector of internal revenue as aforesaid, do collect said assessment with penalty and interest, and that if the same is not paid to seize the property of the petitioners and sell the same to satisfy and pay the said alleged assessment; that the said J. W. Bailey, collector, has transmitted said orders to his deputy, Claude Moser, and has directed that said deputy carry out the said orders of the Commissioner of Internal Revenue.

Five.—Your petitioners are informed and believe that said attempted assessment is made against your petitioners and their property under Title XII, revenue act of 1918, and commonly known as the child labor act, and was made by said Commissioner of Internal Revenue, who claims and avers that during the taxable year
3 1919 your petitioners, Vivian Cotton Mills, employed in their mills children under 14 years of age, and children between 14 years and 16 years of age more than 8 hours a day, after 7 p. m. and before 6 a. m.

Six.—That your petitioner, Vivian Cotton Mills, did not employ children in its mill in violation or derogation of said act to the knowledge of your petitioner; that your petitioner, John J. George, trading and doing business as Vivian Cotton Mills, through his superintendent, overseers, and other officers in authority in said mill made a careful investigation when children applied for employment in said mill and when there was any doubt in the minds of said superintendent and overseers of said mills as to whether or not the child applying was 14 years of age, the said John J. George refused

to employ the said child, and where after careful investigation there was any doubt as to whether the child applying was over 16 years of age said child was not employed more than eight hours per day or after 7 p. m. or before 6 a. m. And your petitioner employed no children more than eight hours a day, after 7 p. m. and before 6 a. m. unless said children were unquestionably over 16 years of age, or unless said children had cards or permits from the Federal inspectors from the Treasury Department issued under the rules and regulations of said department.

Seven.—That a warrant of distraint for the purposes of levying upon and selling the property of your petitioners, to satisfy said assessment has been placed, your affiant is informed and believes, in the hands of Claude Moser, or some other person, as deputy collector of internal revenue and that said deputy or deputies will levy upon and sell the personal and real property of your petitioners thereunder, for the collection of said unlawful and wrongful assessment, unless said collector of internal revenue and said deputies are restrained by order of this honorable court.

Eight.—That your petitioners have not been given a civil or criminal trial, to which they are entitled by law before their property can be taken and condemned, and they are advised, informed, and believe and allege that the said attempted assessment by the Commissioner of Internal Revenue or Acting Commissioner of Internal Revenue of the United States, and the attempted enforcement and collection of the said assessment by J. W. Bailey and his deputy or deputies is illegal, without warrant of or authority of law, and in violation of the due process clause of the Constitution of the United States.

Nine.—That the market for cotton mills and cotton-mill stock and cotton-mill products is unusually low, there being practically no market now, and should the said Commissioner of Internal Revenue be allowed to sell your petitioners' property for the purpose of collecting this illegal assessment your affiant is informed and believes that it would occasion your petitioners a loss of approximately $50,000 and a great and irreparable damage and loss would be otherwise inflicted on your petitioners.

Ten.—That by letter dated December 21, 1920, the Acting Commissioner of Internal Revenue advised your petitioners to file a claim for abatement of the tax, which said claim was duly filed and was disallowed, as these petitioners are informed and believe, and the said J. W. Bailey, collector, and his deputies instructed to proceed to sell your petitioners' property under said warrant of distraint.

4 Eleven—Your petitioners are informed and so believe and allege that said Title XII, revenue act of 1918, and other laws under which this assessment was made and under which the said J. W. Bailey, collector, and his deputies are about to proceed to sell the property of your petitioners are illegal, void, and unconstitutional and in derogation of the Constitution of the United States in

the following respects: (a) In that said act and the attempted enforcement and collection of said assessment and the sale of petitioner's property thereunder is in violation of Article Five of the Constitution in that it is depriving your petitioners of their property without due process of law; (b) in that it is a violation 'f Article VII of the said Constitution in that it denies the right of trial to your petitioners by jury; (c) in that the said act or so much thereof as applies to the assessment of said tax and the attempted levy on and sale of your petitioner's property is in violation 'f the said Constitution and unconstitutional in that it is in violation of *of* Aricle X of said Constitution in that this attempted levy and assessment is not a power delegated to the United States by the Constitution, but is a power reserved to the States and to the people.

Twelve—That these your petitioners have exhausted all legal remedies and it is necessary for them to be given equitable relief in the premises.

Wherefore, your petitioners pray:

(1) That the defendants, their servants and agents and successors in office of the defendants and their servants and agents, be enjoined and restrained from levying upon and selling the plaintiff's property or any part thereof to satisfy and pay said attempted assessment.

(2) That the said assessment of taxes upon the petitioners and the attempted levy and sale thereunder of your petitioners' property be declared illegal, null, void, and unconstitutional.

(3) For such other and further relief in the premises as the nature and equity of this action may require and to this Honorable Court may seem just and equitable.

C. B. FETNER,
Attorney for Petitioners.

UNITED STATES OF AMERICA,
Western District of North Carolina:

John J. George, one of the above names petitioners, being first duly sworn, deposes and says that he has read the foregoing petition, that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

JOHN J. GEORGE.

A true copy.

Sworn and subscribed before me, this 7 day of July, 1921.

(Signed) M. C. MANNLY,
Notary of Public.

My commission expires the 12 day of Dec. 1921.

Test:

R. L. BLAYLOCK,
Clerk,
By E. S. WILLIAMS,
Dep. Clerk.

5 On July 6, 1921, prosecution bond was executed and filed by the plaintiffs, John J. George, trading and doing business as Vivian Cotton Mills, and Vivian Spinning Company, and T. C. Summer, principals and surety.

Said prosecution bond, filed July 6, 1921, is in words and figures as follows, to wit:

6 UNITED STATES OF AMERICA,
Western District of North Carolina.

District Court at Charlotte.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS Vivian Cotton Mills, and Vivian Spinning Company
against
J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE AND Claude Moser, deputy collector of internal revenue, defendants.
Prosecution bond.

Know all men by these presents, that we, John J. George, trading and doing business as Vivian Cotton Mills, and Vivian Spinning Company, principals, and T. C. Summer, sureties, are held and firmly bound unto the defendants in the above-entitled action in the sum of two hundred dollars ($200.00) to the payment of which we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated the 6th day of July, 1921.

The condition of the above obligation is such that whereas the said Vivian Cotton Mills and Vivian Spinning Company, plaintiffs in the above-entitled cause, have this day brought action against the defendants therein: Now, if the said plaintiffs shall prosecute their said action with effect, or in case they fail therein, shall well and truly pay to the said defendants all such costs and damages as shall be awarded and recovered against the said plaintiff, then the above obligation to be void, otherwise to remain in full force and effect.

VIVIAN COTTON MILLS,
By JOHN J. GEORGE, *Owner.* [SEAL.]
VIVIAN SPINNING COMPANY, [SEAL.]
By JOHN J. GEORGE, *Pres.* [SEAL.]
T. C. SUMMER. [SEAL.]

Taken and acknowledged before me this 6th day of July, 1921.

M. C. MAUNEY,
Notary Public.

My commission expires the 12th day of Dec., 1921.

7 And on the 7th day of July, 1921, subpœna in equity was issued.

Said subpœna in equity, issued July 7, 1921, is in words and figures as follows, to wit:

8 UNITED STATES OF AMERICA.
Western District of North Carolina.

In the District Court, Fourth Circuit, at Charlotte, N. C.

The President of the United States of America, to the U. S. Marshal of the Western District of North Carolina, Greeting:

You are hereby commanded, to summons J. W. Bailey, collector of internal revenue, and Claude Moser, deputy collector of internal revenue, citizens of and residents in the State of North Carolina, if they be found in your district, to be and appear in the District Court of the United States for the Western District of North Carolina aforesaid, at Charlotte, on the 26th day of July, 1921, next, to answer a certain bill in chancery, filed and exhibited in said court, against J. W. Bailey, collector of internal revenue, and Claude Moser, deputy collector of internal revenue, by John J. George, trading and doing business as Vivian Cotton Mills and Vivian Spinning Company, citizen of and resident in the State of North Carolina, to receive, perform, and abide any order, judgment, or decree of the court made therein.

Hereof you are not to fail, under the penalty of law thence ensuing, and have you then and there this writ.

Witness, The Hon. E. Y. Webb, judge of the District Court of the United States, at Charlotte, in said district, the 7th [SEAL.] day of July, 1921, and in the one hundred and forty-six year of the Independence of the United States.

Issued the 7th day of July, 1921.

R. L. BLAYLOCK,
Clerk.

By E. S. WILLIAMS,
Deputy Clerk.

The defendant is required to file his answer or other defense in the clerk's office on or before the 20th day after service, excluding the day thereof, otherwise the bill may be taken pro confesso.

Rec'd, July 11th, 1921. Executed 7-11-21 as to Claude Moser, by reading the within summons and leaving a true copy of same with the defendant, Claude Moser.

CHAS. A. WEBB,
Marshall,

By C. W. RUSSELL,
D. M.

Received at Raleigh July 12th, 1921. Executed at Raleigh July 12th, 1921, by leaving summons with J. W. Bailey, collector internal revenue.

GEO. H. BELLAMY,
U. S. Marshal.
B. H. MEADOWS,
D. M.

Marshal's fees, $2.00.

9 Bond for restraining order was thereupon filed, on July 7, 1921.

Said bond filed on July 7, 1921, is in words and figures as follows, to wit:

10 UNITED STATES OF AMERICA,
Western District of North Carolina.

District Court at Charlotte, Fourth Circuit.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS Vivian Cotton Mills, and Vivian Spinning Company.
against
J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE and Claude Moser, deputy collector of internal revenue, defendants.

Bond for restraining order.

Know all men by these presents, that we, John J. George, trading and doing business as Vivian Cotton Mills, and Vivian Spinning Company, principals, and T. C. Summer as surety, are held and firmly bound unto the defendants in the above-entitled action in the sum of two hundred dollars, to the payment of which we bind ourselves firmly by these presents. Sealed with our seals and dated this 6th day of July, 1921.

The condition of the above obligation is such that whereas the plaintiffs in the above-entitled action have brought an action against the said defendants therein, and have obtained a restraining order against the said defendants therein; now, therefore, if the said plaintiff shall well and truly pay said defendants all such costs and damages as they may sustain by reason of the granting of said restraining order in the event the court shall finally determine that the plaintiff is not entitled thereto, then the above obligation is to be null and void; otherwise it is to remain in full force and effect.

JOHN J. GEORGE. [SEAL.]
VIVIAN SPINNING CO.,
By JOHN J. GEORGE, *President.*
T. C. SUMMER. [SEAL.]

Taken and acknowledged before me this 6th day of July, 1921.

M. C. MAUNEY,
Notary of Public.

T. C. Summer, being duly sworn, says that he is the surety whose name is signed to the above undertaking; that he is a resident of and has property within the Western District of the State of North Carolina, to the amount of two hundred dollars, not exempt from execution and is excess of his debts and liabilities.

Sworn to and subscribed before me, this 6 day *day* of July, 1921.

M. C. MAUNEY,
Notary Public.

My commission expires 12th day of December, 1921.

Above bond approved this 7th day of July, 1921.

E. S. WILLIAMS,
Deputy Clerk, U. S. District Court.
R. L. BLALOCK, *Clerk.*
E. S. WILLIAMS, *Dep. Clerk.*

12 And afterwards, to wit, on July 8, 1921, temporary restraining order was issued, said restrain'g order, filed on July 8, 1921, is in words and figures as follows, to wit:

13 UNITED STATES OF AMERICA,
Western District of North Carolina.

District Court at Charlotte.

JOHN J. GEORGE, TRADING AND DOING business as Vivian Cotton Mills, and Vivian Spinning Company,
against
J. W. BAILYE, COLLECTOR OF INTERNAL revenue, and Calude Moser, deputy collector of internal revenue, defendants.
} Restraining order.

This cause coming on to be heard before me at chambers at Asheville, North Carolina, upon the bill of complaint duly verified according to law, and the same for the purpose of this motion appearing to be true;

It is ordered, adjudged, and decreed that the defendants, their servants and agents and their successors in office, be and are hereby restrained from levying upon or selling the property of the complainants until the further order of this court.

And it is further ordered, adjudged and decreed that the defendants, and their successors in office, be and they are hereby ordered and directed to appear before me at Greensboro, N. C., on the 16th day of July, 1921, and show cause, if any they have, why this restraining order should not be continued until the hearing or made permanent in accordance with the law and the facts in the premises.

This order shall not become effective, however, until the complainants shall give bond in the sum of two hundred dollars, with good and sufficient surety to be approved by the deputy clerk of the United States District Court at Charlotte, North Carolina, conditioned to pay the defendants such damages as they may sustain by reason of the granting of this order in the event the court shall finally determine that the plaintiffs were not entitled thereto.

This 8th day of July, 1921.

J. E. BOYD,
United States Judge.

Bond in the sum of $200.00 filed and approved.

E. S. WILLIAMS, *Dep. Clerk.*

14 And on July, 1921, affidavits were filed by H. D. George, W. J. Friday, J. D. Frye, L. W. McGinnas, and H. D. George, respectively, said affidavits being in words and figures as follows, to wit:

15 UNITED STATES OF AMERICA,
Western District of North Carolina.

District Court at Charlotte, Fourth Circuit.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS VIVIAN Cotton Mills, and Vivian Spinning Company,
against
J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, AND Claude Moser, deputy collector of internal revenue, defendants.
} Affidavit.

Personally appeared before me this day H. D. George, who, after being duly sworn, deposes and says:

That he was general superintendent of the Vivian Cotton Mills for the year 1919, during which time the alleged violations of the Federal child labor law occurred, and that during said time no child under the age of fourteen years was allowed to work in said Vivian Cotton Mills, nor was any child allowed to work therein between the ages of fourteen and sixteen years longer than eight hours in any one day, or more than six days in any week, or before 6 a. m. or after 7 p. m. during any portion of the taxable year, where it was known to me or any of the other officers of said Vivian Cotton Mills. That it was the strict policy of the owners and operators of the Vivian Cotton Mills to immediately discharge all children upon receiving any information whatsoever that they were under the legal age of 14 years, and to carefully guard the working hours of those between the ages of fourteen and sixteen years. That it was the further policy of the owners and operators of said Vivian Cotton

Mills to thoroughly investigate, where there was any question of any child's age who was seeking employment in the said mills.

H. D. GEORGE.

Subscribed and sworn to before me this the 7th day of July, 1921.

M. C. MAUNLY, *N. P.*

My com. expires Dec. 12, 1921.

16 UNITED STATES OF AMERICA,
Western District of North Carolina.

District Court at Charlotte, Fourth District.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS Vivian Cotton Mills, and Vivian Spinning Company,

against

J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, and Claude Moser, deputy collector of internal revenue, defendants.

Affidavit.

Personally appeared before me this day W. J. Friday, who, after being duly sworn, deposes and says:

That he was superintendent of the Vivian Cotton Mills during the year 1919, and in direct charge of said mills, and in the employment of all labor used in said mills. That to his own personal knowledge no child under the age of 14 years was allowed to work in said mills during said time. That no child under the age of sixteen, and more than fourteen years of age was allowed to work in said mills during the year 1919, except in daylight, and only then during legal hours, and by permit. That where any question arose as to the age of any child, a careful investigation was made, and when any child's age was found questionable, it was immediately discharged. That except in the case of Novella Quinn was there any question as to the age of any child working in said mills while he was superintendent, and she was immediately discharged when it became doubtful that she was of legal age to work therein. That this was the only case where any question arose, and called to their attention by an inspector.

J. W. FRIDAY.

Subscribed and sworn to before me this the 7th day of July 1921.

M. C. MAUNLY, *N. P.*

My commission expires Dec. 12, 1921.

17 UNITED STATES OF AMERICA,
Western District of North Carolina.

District at Charlotte, Fourth District.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS Vivian Cotton Mills, and Vivian Spinning Company
against
J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, and Claud Moser, deputy collector of internal revenue, defendants.
} Affidavit.

Personally appeared before me this day, J. D. Fry, who, after being duly sworn, deposes and says:

That he was an overseer in the spinning room of the Vivian Cotton Mills during the year 1919, and that during said time no child under the age of 14 years was allowed to work therein where it was known. That no child between the ages of fourteen and sixteen years was allowed to work in said mills except in daylight, and only then during the legal hours, and by permit. That it was the policy of the mill owners and operators to carefully investigate the age of any child where it was questionable, and where it was found to be doubtful the child was immediately discharged.

J. D. FRYE.

Subscribed and sworn to before me this the 7th day of July, 1921.

M. C. MAUNEY, *N. P.*

My com. expires December 12, 1921.

18 UNITED STATES OF AMERICA,
Western District of North Carolina.

District Court at Charlotte, Fourth District.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS Vivian Cotton Mills, and Vivian Spinning Company
against
J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, and Claud Moser, deputy collector of internal revenue, defendants.
} Affidavit.

Personally appeared before me this day, Webb McGinnas, who, after being duly sworn, deposes and says:

That he was an overseer in the spinning room of the Vivian Cotton Mills during the year 1919, and that during said time no child under the age of 14 years was allowed to work therein where it was

known. That no child between the ages of fourteen and sixteen years was allowed to work in said mills except in daylight, and only then during the legal hours, and by permit. That it was the policy of the mill owners and operators to carefully investigate the age of any child where it was questionable, and where it was found doubtful the child was immediately discharged.

L. W. McGINNAS.

Subscribed and sworn to before me this the 7th day of July, 1921.

[SEAL.] M. C. MAUNEY,
Notary Public.

My com. ex. Dec. 12, 1921.

19 UNITED STATES OF AMERICA,
Western District of North Carolina.

District Court at Charlotte, Fourth Circuit.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS Vivian Cotton Mills, and Vivian Spinning Company
against
J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, and Claude Moser, deputy collector of internal revenue, defendants.
} Affidavit.

Personally appeared before me this day, H. D. George, who, after being duly sworn, deposes and says:

That he was general superintendent of the Vivian Cotton Mills during the year 1919. That during the year 1920, W. E. Younts visited the Vivian Cotton Mills, and obtained a report with reference to the employment of children in said mills. That he, the said H. D. George, had never made one of these reports previous to that time, and did not understand filling out said report and that he answered as directed by Mr. Younts. That he understood that he reported no children between the ages of fourteen and sixteen years, except where permits had been given, and then only during the legal hours, were working in said mills, or had ever worked in said mills, except under conditions as above set forth. That he has been informed the report states that children under the age of fourteen years had worked therein during the year 1919. That if he made that statement, it was an error, since he knew then as he knows now that no child under the age of 14 years had ever worked in said mills since the enactment of the child labor law where it was known to the owners and operators of the mills. This report was C. L. T. 17.

(Signed) H. D. GEORGE.

Subscribed and sworn to before me, this July 7, 1921.

M. C. MAUNEY, *N. P.*

My com. expires Dec. 12, 1921.

20 And afterwards, to wit, on July 16, 1921, an order was filed, restraining defendants from levying upon or selling the property of the complainants until further order of the court.

Said restraining order, filed July 16, 1921, is in words and figures as follows, to wit:

21 In the District Court of the United States for the Western District of North Carolina, at Charlotte.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS VIVIAN Cotton Mills, and Vivian Spinning Company, plaintiff,
vs.
J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, AND CLAUD Moser, deputy collector of internal revenue, defendants. } Order.

This cause coming on to be heard before me at chambers at Greensboro, North Carolina, it is ordered and adjudged that the petitioners in this cause be and they are allowed to amend the bill heretofore filed in this cause by adding to paragraph eleven of said bill, subsection D, as set forth in the petition dated and filed the 16th day of July, 1921.

This cause coming to be heard upon the bill of complaint and the duly verified amended complaint of petition,

It is ordered, adjudged, and decreed, that the defendants, their servants and agents, and their successors in office, be, and they are hereby, restrained from levying upon or selling the property of the complainants until the further order of the court.

And it is further ordered, adjudged, and decreed, that the defendants and their successors in office, be, and they are hereby, ordered and directed to appear before me at Greensboro, on the 1st day of August, 1921, and show cause, if any they have, why this restraining order should not be continued until the hearing, or made permanent in accordance with the law and the facts in the premises.

It is further ordered that a copy of the amended bill, together with a certified copy of this order, be mailed to each of the said defendants at their respective addresses by the deputy clerk at Charlotte.

The clerk will enter this order at Charlotte,

This the 16th day of July, 1921.

(Signed) J. E. BOYD,
U. S. Judge.

22 And on the 16th day of July, 1921, an amendment to bill of complaint was filed in the office of the clerk of the District Court of the United States for the Western District of North Carolina, at Greensboro, North Carolina, in said case, said amendment to bill of complaint, filed July 16, 1921, is in words and figures as follows, to wit:

23 UNITED STATES OF AMERICA,
Western District of North Carolina.

In the United States District Court at Charlotte.

JOHN J. GEORGE, TRADING AND DOING business as Vivian Cotton Mills, and Vivian Spinning Company *vs.* J. W. BAILEY, COLLECTOR OF INTERNAL revenue, and Claude Moser, deputy collector of internal revenue, defendants.	Amendment to bill.

In equity.

Your petitioners beg leave to amend the bill heretofore filed in this cause by adding to paragraph eleven of said bill subsection (d) as follows:

ELEVEN.

(d) In that, as will appear from the very terms and provisions of the act itself, it is in no sense a tax measure, intended to raise revenue, but it is in fact an attempted regulation of the hours of labor permitted in factories and mines within the several States, and the alleged assessment above referred to is in no sense a tax but is in fact equivalent to a fine or penalty imposed upon any manufacturer failing to comply with the attempted regulation of hours of labor and age of employees, and that the said fine or penalty has been imposed on the petitioner without an opportunity for him to be heard, and that the said warrant of distraint has been placed in the hands of the officer for the purpose of levying upon and selling the property of the petitioner, although he is not in fact liable for said fine or penalty and although he has been given no opportunity to be heard.

UNITED STATES OF AMERICA,
Western District of North Carolina.

John J. George, one of the above-named petitioners, being first duly sworn, deposes and says that he has read the foregoing amendment to the petition; that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

(Signed) JOHN J. GEORGE.

Sworn and subscribed before me this the 16 day of July, 1921.

R. L. BLAYLOCK,
Clerk U. S. Court.

24 And thereafter, to wit, on the 16th day of July, 1921, an answer was filed.

Said answer filed July 16, 1921, is in words and figures as follows, to wit:

25 (Copy)

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the United States District Court, at Charlotte.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS Vivian Cotton Mills, and Vivian Spinning Company,
against
J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, AND Claude Moser, deputy collector of internal revenue, defendants.
} Answer.

In equity.

The answer of the above-named defendants to the bill of complaint of the above-named petitioners.

The defendants answering the bill and amended bill of the petitioners, say:

1st. That they admit the allegations contained in paragraph one of the said bill.

2nd. That they admit the allegations contained in paragraph two of the said bill, except that they have no information upon which to form a belief as to the truth of the allegations that the Vivian Spinning Company was organized for the purpose of taking over the property of the Vivian Cotton Mills.

3rd. That they admit the allegations contained in paragraph three of the said bill.

4th. That they admit the allegations contained in paragraph four of the said bill, except that they deny that the assessment levied and penalty imposed as set forth in said bill was an attempted levy, but was in fact, a lawful assessment levied under the authority of the laws of the United States.

5th. That they admit the allegations contained in paragraph five of the said bill, except that they deny that said assessment was an "attempted," but in fact, a lawful assessment levied under the authority of the laws of the United States.

6th. That they deny the allegation contained in paragraph six of said bill.

26 7th that they admit the allegations contained in paragraph seven of the said bill.

8th. That they deny the allegations contained in paragraph eight of the said bill; that they have no information upon which to form

a belief as to the allegations contained in paragraph nine of the said bill.

10th. That they deny the allegations contained in paragraph ten of the said bill.

11th. That they deny the allegations contained in paragraph eleven of the said bill.

12th. That they deny the allegations contained in paragraph twelve of the said bill.

13th. That they deny the allegations contained in the amendments of paragraph eleven of the original bill and filed in this case as "Amendment to bill."

The defendants further answering the petitioners say:

1. That the petitioners herein, to wit, John J. George, trading and doing business as the Vivian Cotton Mills, and the Vivian Spinning Company, filed a report in the office of J. W. Bailey, collector of internal revenue, and in the Office of Internal Revenue, Washington, on what is known as Form 17, Child Labor Tax, admitting that he and it has worked children during the taxable year 1919 in violation of title twelve, revenue act of 1918, in that he and it admitted in said form that they employed children under 16 years of age for more that eight hours per day, and further admitted that they employed children under 16 years of age between the hours of 7 p. m. and 6 a. m. during the taxable year 1919.

2. That during or for the taxable year 1919 the said petitioners John J. George, trading and doing business as the Vivian Cotton Mills, and Vivian Spinning Company, made a report on what is known as Form 18, Child Labor Tax, in which they admitted that their profits for the taxable year 1919 were a certain definite sum as shown on said report, and upon these profits the assessment of
27 10%, amounting to $2,098.06, were levied, together with penalty of 5% with interest at 1% per month from Nov. 19th, 1920, the date of assessment, all as required and authorized by said revenue act of 1918.

3. That the revenue act for 1918, particularly title 12 of said act, is a valid and lawful act of Congress of the United States, and is not in violation or in derogation of article 5 or article 7 of the Constitution of the United States of American or any other article of said Constitution; and that the said assessment and levy thereunder is in every way legal, lawful, regular, and constitional.

Wherefore the defendants pray that relief asked for by the petitioners in paragraphs 1, 2, and 3 of their prayer be denied and that the restraining order herein be dissolved and the defendants be allowed to proceed as authorized by said title 12 of revenue act 1918 and the said bill be dismissed with costs.

S. J. DURHAM,
U. S. Attorney.
By HAMILTON C. JEREY,
Asst. U. S. Attorney.

UNITED STATES OF AMERICA,
Western District of North Carolina.

Claude Moser, one of the above-named defendants, being first deuly sworn, deposes and says that he has read the foregoing answer and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

CLAUDE A. MOSER.

Sworn to and subscribed before me this the 7th day of August, 1921.

D. T. APPLEGATE,
Notary Public.

My commisison expires the 19th day of Aug., 1922.

28 And thereafter, to wit, on August 1, 1921, an order was issued, continuing said cause until Monday, August 8, 1921. Said order, filed August 1, 1921, is in words and figures as follows, to wit:

29 In the District Court of the United States for the Western District of North Carolina.

JOHN J. GEORGE, TRADING AS VIVIAN COTTON Mills; Vivian Spinning Company, plaintiffs, *vs.* J. W. BAILEY, COLLECTOR, C. A. MOSER, defendants.	Order.

On motion of S. J. Durham, United States attorney, this cause is continued until Monday, August 8, 1921, and the defendants are allowed to file on or before that date their answer in said cause or such pleadings as they may deem proper.

This the 1st day of August, 1921.

J. E. BOYD,
United States Judge.

30 On August 1, 1921, an order allowing defendants to withdraw demurrer, and continuing cause until Monday, August 8, 1921, was filed.

Said order filed August 1, 1921, is in words and figures as follows, to wit:

31 In the District Court of the United States for the Western District of North Carolina, at Charlotte.

JOHN J. GEORGE, TRADING AND DOING BUSINESS as Vivian Cotton Mills, and Vivian Spinning Company, plaintiffs,
vs.
J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, and Claud Moser, deputy collector of internal revenue, defendants.
} Order.

This cause coming on to be heard before me at chambers at Greensboro, North Carolina, it is ordered and adjudged that the defendants be allowed to withdraw the demurrer heretofore filed in this cause.

It is further ordered that this cause be continued until Monday, August 8th, 1921, and that the restraining order heretofore made in this cause be continued until that date.

It is further ordered that the defendants in this cause be allowed until August 8, 1921, to file an answer in this cause, and that they appear before me on that date to show cause, if any, why the restraining order heretofore made should not be continued until the final hearing.

The clerk will enter this order at Charlotte.

This the 1st day of August, 1921.

J. E. BOYD,
United States Judge.

32 And thereafter, on August 5, 1921, a motion to dismiss was filed.

Said motion to dismiss, filed August 5, 1921, is in words and figures as follows, to wit:

33 In the District Court of the United States for the Western District of North Carolina, at Greensboro.

JOHN J. GEORGE, TRADING AS VIVIAN COTTON MILLS, AND Vivian Spinning Company,
vs.
J. W. BAILEY, COLLECTOR, AND C. A. MOSER.
} Motion.

S. J. Durham, United States attorney, appearing on behalf of the defendants, moves to dismiss the cause for that on the face of the complaint it is an action seeking to enjoin the collection of taxes, and the court is without jurisdiction, to hear and determine the issues raised.

S. J. DURHAM,
U. S. Attorney.

This the 5th day of August, 1921.

34 And afterwards, to wit, on August 8, 1921, an order was filed adjourning said cause until Monday, August 15, 1921.

Said order of adjournment, filed August 8, 1921, is in words and figures as follows, to wit:

35 In the District Court of the United States for the Western District of North Carolina.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS VIVIAN Cotton Mills, and Vivian Spinning Company, complainants,
vs.
J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, AND CLAUDE Moser, deputy collector of internal revenue, defendants.
} Order.

This case coming on to be heard to-day, upon plaintiffs' motion for injunction, and it appearing that in the meantime, defendant has filed an answer, of which plaintiffs' counsel has not been advised:

It is ordered that the further hearing of the case be adjourned until Monday the 15th day of August, 1921, at 2.30 o'clock p. m.

In the meantime the order of restraint as heretofore issued shall remain in full force.

This the 8th day of August, 1921.

The clerk will enter at Charlotte and mail copy to counsel of record.

JAS. E. BOYD,
U. S. District Judge.

A true copy: Test:

R. L. BLAYLOCK,
Clerk,
By E. S. WILLIAMS,
Deputy Clerk.

36 And on August 15, 1921, an order was filed, adjourning said cause until Monday, August 22, 1921.

Said order, filed August 15, 1921, is in words and figures as follows, to wit:

37 In the District Court of the United States for the Western District of North Carolina, at Greensboro.

JOHN J. GEORGE, TRADING AS VIVIAN COTTON MILLS, and Vivian Spinning Company, complainants,
vs.
J. W. BAILEY, COLLECTOR, AND CLAUDE MOSE, DEPUTY collector, defendants.
} Order.

This case coming on to be heard to-day, the plaintiffs being represented by C. B. Fenner, Esq., and the defendants by S. J. Durham,

Esq., United States attorney. At the suggestion of the court the case is further adjourned to Monday, the 22nd day of August, 1921, for final hearing upon the bill and answer and upon defendants' motion to dismiss for want of jurisdiction. In the meantime both parties are allowed to file briefs, provided the same are on file before the 19th instant.

The clerk will enter.

This the 15th day of August, 1921.

J. E. BOYD,
United States Judge.

38 And thereafter, to-wit, on August 22, 1921, and order was filed, decreeing that temporary restraining order be made permanent, forbidding defendant to proceed to collect said assessment.

Said restraining order, dated August 22, 1921, is in words and figures as follows, to wit:

39 In the District Court of the United States for the Western District of North Carolina.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS Vivian Cotton Mills, and Vivian Spinning Company, plaintiff,

vs.

J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, and Claud Moser, deputy collector of internal revenue.

Order.

This case coming on to be heard upon the bill of complaint of the complainant and the answer of the defendant, and it being admitted by the answer, as alleged in the complaint; that the complainant is a resident of Gaston County, North Carolina, and operates a manufacturing plant for the production of cotton goods, and that the defendant is collector of internal revenue for the State of North Carolina; that on the alleged ground that complainant has employed child labor in its manufactory in violation of section #1200 of an act of Congress to provide revenue and for other purposes, approved February 24, 1919 (vol. 40, Stat. at Large, part 1, page 1057).

That complainant filed claim for abatement of the said taxes (which amount to $2,098.06) and that the said claim has been denied; that thereupon the collector was proceeding by warrant of distraint to collect the said taxes, together with penalty and interest, by levying upon and selling the property of the complainant; and defendant having made his motion to dismiss the action for the want of jurisdiction, on the ground that the court is forbidden by law to restrain the collection of tax, it is now on this the 22 day of August, 1921, to which date the hearings have been adjourned, adjudged and decreed that motion to dismiss be denied; that the tax assessed is illegal, erroneous, and unauthorized by the Constitution

of the United States; that the act of Congress which authorized the said assessment is invalid, in that it undertakes to exercise powers which are not delegated to the United States by the Constitution, but reserved to the States respectively.

40 Thereupon it is decreed that the temporary restraining order heretofore issued, forbidding the defendant to proceed to collect the said assessment, is hereby made permanent.

The clerk will enter this decree at Charlotte and certify copies to the complainants' attorneys and also to the U. S. attorney of this district who represents the defendants.

This the 22nd day of August, 1921.

JAMES E. BOYD,
U. S. District Judge.

A true copy: Test:
[SEAL.]

R. L. BLAYLOCK,
Clerk.

By E. S. WILLIAMS,
Deputy Clerk.

41 And thereafter an opinion was rendered by J. E. Boyd, judge, U. S. court, in said cause, which opinion is in words and figures as follows, to wit:

42 In the District Court of the United States for the Western District of North Carolina, at Greensboro.

JOHN J. GEORGE, TRADING AND DOING BUSINESS as Vivian Cotton Mills, and Vivian Spinning Co., complainants,
vs.
J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE for the district of North Carolina, and Claude Moser, one of his deputies, defendants. } Equity.

Before Hon. Jas. E. Boyd, U. S. district judge for the Western District of North Carolina.

Argued the 16th day of August, 1921; decided the 22nd day of August, 1921.

John M. Robinson and C. B. Fether, of Charlotte, North Carolina, attorneys for the complainant.

Stonewall Jackson Durham, United States attorney for the Western District of North Carolina, attorney for the defendants.

43 STATEMENT.

The complainant is John J. George, trading and doing business as Vivian Cotton Mills, and Vivian Spinning Company, operating plants for the manufacture of cotton goods at Cherryville, in the

county of Gaston, in this district. The defendants are J. W. Bailey, collector of internal revenue for the District of North Carolina, and Claude Moser, one of his deputies.

On the 9th of November, 1920, the Commissioner of Internal Revenue made an assessment for taxes against the complainant for $2,098.06, to be due the 19th of November, 1920. Penalty at the rate of five per cent and interest at the rate of one per cent per month for failure to pay the tax assessed by the date it was due was included. Upon notice of the assessment to the complainant, appeal was made by him to the Commissioner of Internal Revenue to remit the same. The appeal being upon the form prescribed by the Treasury Department and termed a claim for abatement. This claim was denied by the Commissioner of Internal Revenue, and thereupon the defendant J. W. Bailey, through his deputy Claude Moser, was about to proceed by warrant of distraint to subject the property of complainant to sale to satisfy the said assessment.

The said assessment was made against the said complainant by the Commissioner of Internal Revenue under authority, as it is claimed, of Title XII, section 1200, of the act of Congress approved February 24th, 1919. This section is set out in the opinion.

The defendants have filed an answer denying some of the several allegations of the bill, but admitting the assessment for the amount set forth; that claim for abatement has been filed and denied; and that the collector, through his deputy, is proceeding by warrant of distraint to collect the taxes with penalty and interest.

The purpose of complainant's bill is to restrain the collector and his deputy from proceeding to levy upon and sell his property to satisfy the assessment.

44 BOYD, *District Judge*.

In order to pass intelligently upon the questions involved in this case reference is had to certain of the provisions of two Federal statutes and one statute of the State of North Carolina. The first of the Federal statutes to be referred to is what is known as the Owen-Keating Act, which was passed by the 64th Congress and will be found in vol. 39, U. S. Statutes at Large, chapter 432, page 675. It is entitled "An act to prevent interstate commerce in the products of child labor, and for other purposes." The following, quoted from that act, is all that is deemed necessary to reproduce here:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no producer, manufacturer, or dealer shall ship, or deliver for shipment, in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity, the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United

States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any article or commodity under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipment or deliveries for shipment of any such article or commodity before the beginning of said prosecution."

This statute was before the Supreme Court of the United States upon an appeal from a decision of this court to the effect that it is beyond the powers delegated by the Constitution to the United States to regulate labor within a State by an act of Congress. This decision was affirmed by the Supreme Court, in the case of Hammer *vs.* Dagenhart, reported in 247 U. S., 251. Mr. Justice Day in
45 delivering the opinion of the court among other things said:

"In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. Lane County v. Oregon, 7 Wall., 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the General Government. New York v. Miln, 11 Pet., 102, 139; Slaughter House Cases, 16 Wall., 36, 63; Kidd v. Pearson, supra. To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States."

It is held in Dartmouth College v. Woodward, 4 Wheat., 518:

"That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed may be admitted."

It was contended by the Government in the Dagenhart case, that the interstate commerce provision of the Constitution which authorizes Congress to regulate commerce with foreign nations, between the several States, and with the Indian tribes, conferred the power which made the act valid, but the Supreme Court overruled this contention in most emphatic terms, as will be observed from this further quotation from the Dagenhart opinion:

"The control by Congress over interstate commerce can not authorize the exercise of authority not entrusted to it by the Con-

stitution. Pipe Line Cases, 234 U. S., 548, 560. The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution."

There can be no possible misunderstanding as to the meaning of this decision, for it is distinctly declared, that the right to regulate labor within a State is a State function and that Congress is forbidden by the Constitution to interfere with it.

46 After the Dagenhart decision Congress has undertaken to avoid its effect by enacting section 1200 of Title XII of "An act to provide revenue and for other purposes," approved February 24th, 1919 (40 Stat. at Large, part one, page 1057). This section is in the following language:

"That every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (a) any mine or quarry situated in the United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to ten per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment."

It will be noted that this section is practically a reproduction of the material provisions of the Owen-Keating bill. The only difference being that under that bill the product of an establishment using child labor was forbidden transportation in interstate commerce, and in the present act an establishment using child labor contrary to its provisions is subject to a tax of ten per centum upon the net income derived from its operations.

The question which suggests itself in the outset is, whether the last act is intended to raise revenue. It will scarcely be insisted that such is its object. It is more reasonable to conclude that the purpose of the tax feature is to impose a penalty in order to deter the violation of the child labor provision. It would be a rather nonproductive revenue system which imposed taxes, the effect of which would

47 be to annihilate the subject of taxation, or to prohibit the exercise of the privilege for which the tax is levied.

In case of Collins v. New Hampshire, 171 U. S., 30, 33–34, the following is found:

"The direct and necessary result of statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

This doctrine is reaffirmed in the Dagenhart Case, supra.

In what are called the Pipe Line cases, 234 U. S., 548,560, the Supreme Court used this language which is quoted before in this opinion:

"The control by Congress over interstate commerce can not authorize the exercise of authority not entrusted to it by the Constitution."

If that principle applies to the authority of Congress in the regulation of commerce, there is no reason why it should not apply in raising revenue by taxation, for the power delegated to the United States to levy and collect taxes is no more elastic than the power delegated by the commerce provision. As bearing upon this point the following is quoted from the opinion in Veazie Bank *v.* Fenno, 75 U. S., 533, which was a case involving the right of the Federal Government to levy taxes upon State banks.

"There are indeed certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution."

By the Constitution the Federal Government is invested with power by congressional legislation, "to lay and collect taxes, duties, imposts, and excises, to pay the debt, and provide for the common defense and general welfare of the United States." But nowhere in the Constitution can be found authority to the National Government to regulate labor within the States.

48 Upon consideration of the prime question in this case and the authorities bearing upon it, the conclusion seems to be irresistible that the National Legislature cannot do indirectly, that which it is forbidden by the Constitution to do directly. And it being definitely determined by the highest court of the land that the right to regulate labor is inherent in the States, then Congress can not intervene to control it, either by way of interstate commerce, efforts to levy taxes, or by any other method.

Having disposed of the two Federal statutes which were to be discussed in passing upon the question involved in the case in hand, it is deemed expedient to comment upon the statute of the State of North Carolina in regard to child labor. This statute can be found

in the Public Laws of North Carolina, session of 1919, chapter 100, 274. Section five of the act is as follows:

"No child under the age of fourteen years shall be employed or permitted to work in or about or in connection with any mill, factory, cannery, workshop, manufacturing establishment, laundry, bakery, mercantile establishment, office, hotel, restaurant, barber shop, bootblack stand, public stable, garage, place of amusement, brickyard, lumberyard, or any messenger or delivery service, except in cases and under regulations prescribed by the commission hereinafter created: *Provided*, The employments in this section enumerated shall not be construed to include bona fide boys' and girls' canning clubs, recognized by the agricultural department of this State; and such canning clubs are hereby expressly exempted from the provisions of this act."

The child labor law of North Carolina is made a feature of the public school system of the State, thus concentrating the means for the promotion of the mental and the physical welfare of children under one harmonious plan, to be carried out by the agencies provided for in the act, the purposes of which are to foster the health and physical development of children and at the same time train their minds for future usefulness, and its provisions appear ample to accomplish these ends.

By comparing the Federal and State statutes it will be
49 readily seen that the latter affords as much protection to the health and physical condition of children as the former, and, as stated before, the State act coordinates its purpose to promote physical welfare, with provisions for mental training, and further, an important provision in the State statute is the punishment provided for its violation, instead of undertaking, as the Federal act, to make the income of an establishment using child labor illegally the subject of taxation, it denounces as a criminal offense the violation of its provisions and subjects the offender to a fine or imprisonment, or both, at the discretion of the court.

There can be no doubt as a general proposition that the average person is more heedful respecting laws constituting crime than they are those creating civil liability. For this reason the State statute is undoubtedly more capable of prompt execution than the act of Congress, and the expenses incident to it when compared to that of the Federal plan must necessarily be a great deal less, but however that may be, the burden incident to the enforcement of the State law is not a drain upon the Federal Treasury but is borne by the States.

It is admitted that Congress engaged in a laudable undertaking when it set about to regulate child labor in the country. It began with the enactment of the Owen-Keating law, September 1st, 1916, which was followed February 24th, 1919, by the passing of the statute now under consideration. There can be no criticism of the purposes our representatives had in view in the enactment of these statutes, for it is evident that they were prompted by the highest motives of humanity, accompanied with a desire to protect children from

mental and physical deterioration, in order to maintain a standard of manhood and womanhood fully prepared to respond to the obligations and duties resting upon the citizens of this country.

50 There could be no reasonable ground for dissenting to what Congress has done if the action came within the scope of power delegated to the United States by the Constitution, but, as before stated, the Supreme Court has put an end to this question and has decided in terms not susceptible of difference of opinion, that Congress is not authorized to deal with this subject with the view of Federal control, but that such is the function of the several States each to proceed in its own way.

The State of North Carolina has undertaken to utilize the power reserved to it by the Constitution of the United States to control child labor within its borders, and through the general assembly a law which is deemed wise, regulating this character of labor, has been enacted and provision made for its efficient enforcement.

In the presentation of this case counsel for the defendant moved to dismiss complainant's bill, relying upon section 3224 of the Revised Statutes, which is in the following language:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

It is insisted that this statute renders the courts powerless to intervene where the Government is proceeding under assessments to collect taxes, no matter whether the tax is legal or illegal, well founded or erroneous, constitutional or unconstitutional. If this position can be maintained, then Congress, under the guise of raising revenue by taxation, can overcome all constitutional barriers.

The position taken by the counsel for the defendant does not appeal to the court here as being based upon sound reason or intelligent construction. The tenth amendment to the Constitution reads as follows:

52 The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

From time to time the courts have been called on to construe the meaning of this amendment, and almost without exception it has been held that the powers of the National Government are *are* limited to those delegated. This construction is fortified by the ninth amendment which reads as follows:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people."

This amendment must be construed to mean that in framing the Constitution the sovereign people of the several States, ceded to the General Government certain designated powers, leaving all other rights and powers such as are necessary to maintain our dual system of government to the States respectively and to the people.

This court fully realizes the necessity for the maintenance by all available means of healthful conditions among children, and the obligation which rests upon us as a provident people, to rear men

and women well equipped mentally and physically for future usefulness is profoundly appreciated. There is ample authority somewhere in our governmental system to meet this obligation and discharge this duty. The Supreme Court has declared that the duty devolves upon the States respectively as one of reserved powers. It would seem therefore that the States in their efforts to meet this obligation should be left undisturbed by Federal intervention.

In keeping with the line of the foregoing discussion the conclusion is that the defendants' motion to dismiss for the want of jurisdiction should be denied. That in passing the act in question Congress exceeded the powers delegated to the United States by the Constitution; that the assessment against the complainant is un-
53 warranted and is not a tax such as contemplated by law to raise revenue, but may be termed a penalty to prevent the violation of the provisions of the act, which could not be enforced by assessment and warrant of distraint, even if the act was valid; that he is entitled to the relief prayed for in his bill, and that the temporary restraint heretofore granted should be made permanent.

54 And thereafter, an assignment of errors was filed by defendants apellants.

Said assignment of errors is in words and figures as follows, to wit:

55 In the District Court of the United States for the Western District of North Carolina.

JOHN J. GEORGE, TRADING AND DOING BUSINESS as Vivian Cotton Mills, and Vivian Spinning Company, plaintiffs, respondents *against* J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, and Claude Mosey, deputy collector of internal revenue, defendants, appellants.	In equity. Assignment of errors.

The defendants, J. W. Bailey, collector of internal revenue, and Claude Moser, deputy collector of internal revenue, applying by counsel for an appeal to the Supreme Court of the United States and presenting herewith an appeal bond, now, as their assignment of errors, shows the court erred:

1. In not sustaining defendants' motion to dismiss the bill, for that on the face of the bill of complaint, it is an action seeking to enjoin the collection of taxes, and the court is without jurisdiction to hear and decide the issues raised.

2. In not sustaining the motion to dismiss the bill as prayed in defendants' answer.

3. In not entering a decree dismissing the bill.

4. In not upholding the validity of the revenue act of 1918, commonly known as the child-labor act, and particularly Title XII

of said act of Congress and section 1200 of said Title XII, approved February 24th, 1919, as set forth in the bill.

5. In enjoining the said defendants, J. W. Bailey, collector of internal revenue, and Claude Moser, deputy collector of internal revenue, as prayed in the bill.

6. In decreeing that the tax assessed against the plaintiffs herein is illegal, erroneous, and unauthorized by the Constitution of the United States.

56 7. In adjudging that the act of Congress, which authorized the said assessment is involved, in that it undertakes to exercise powers which are not delegated to the United States by the Constitution but reserved to the States.

8. For refusing defendants' prayer to withhold the temporary restraining orders issued in this cause.

F. A. LINNEY,
U. S. Attorney and Counsel for Appellants.

57 And thereafter, to wit on 8th day of October, 1921, notice of petition for appeal was filed by F. A. Linney, United States attorney and counsel for defendants, appellants, said notice of petition for appeal, dated October 8, 1921, being in words and figures as follows, to wit:

58 In the District Court of the United States for the Western District of North Carolina.

JOHN J. GEORGE, TRADING AND DOING BUSINESS as Vivian Cotton Mills, and Vivian Spinning Company, plaintiffs, respondents *against* J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, and Claude Moser, deputy collector of internal revenue, defendants, appellants.	Notice of petition for appeal.

To John J. George, trading and doing business as Vivian Cotton Mills, and Vivian Spinning Company, respondents:

You are hereby notified that the above-named defendants, appellants, J. W. Bailey, collector of internal revenue, and Claude Moser, deputy collector of internal revenue, will petition the Hon. James E. Boyd, U. S. district judge, at Greensboro, N. C., on October 10, 1921, at 12 o'clock for an appeal to the Supreme Court of the United States from an order or decree entered in said cause on the 22nd day of August, 1921, from which they conceive themselves aggrieved.

F. A. LINNEY,
U. S. Atty.,
Attorney & Counsel for Defendants, Appellants.

Service of the above notice hereby accepted this 8th day of October, 1921.

JOHN M. ROBINSON.

59 And on the 11th day of October, 1921, a motion for appeal was filed.

Said motion for appeal, filed October 11, 1921, is in words and figures as follows, to wit:

60 In the District Court of the United States for the Western District of North Carolina.

JOHN J. GEORGE, TRADING AND DOING BUSINESS as Vivian Cotton Mills, and Vivian Spinning Company, respondents,

against

J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, and Claude Moser, deputy collector of internal revenue, defendants, appellants.

} Appeal and allowance

In equity.

The above name defendants, J. W. Bailey, collector of internal revenue, and Claude Moser, deputy collector of internal revenue, conceiving themselves aggrieved by the order or decree entered on the 22nd day of August 1921, in the above entitled proceeding, doth hereby appeal from said order or decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and they pray that this their appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order or decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

J. W. BAILEY & CLAUDE MOSER.
By F. A. LUIRY,
U. S. District Atty. & Counsel for Appellants.

GREENSBORO, *October 11, 1921.*

And now, to wit, on October 11th, 1921, it is ordered that the appeal be allowed as prayed for.

J. E. BOYD,
District Judge for Western District of North Carolina.

61 And on the 11th day of October, 1921, citation was issued to said plaintiffs.

Said citation, issued on October 11, 1921, is in words and figures as follows, to wit:

62 In the District Court of the United States for the Western District of North Carolina.

JOHN J. GEORGE, TRADING AND DOING BUSINESS as Vivian Cotton Mills, and Vivian Spinning Company, respondents,

against

J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, and Claude Mosey, deputy collector of internal revenue, appellants.

Citation on ap'eal.

To John J. George, trading and doing business as Vivian Cotton Mills, and Vivian Spinning Company, respondents:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on Tuesday, the 8th day of November, next, pursuant to an appeal, filed in the clerk's office of the District Court of the United States, for the Western District of North Carolina, wherein J. W. Bailey, collector of internal revenue, and Claude Moser, deputy collector of internal revenue, are appellants, and John J. George, trading and doing business as Vivian Cotton Mills and Vivian Spinning Company are respondents, to show cause, if any there be, why the judgment in the said appeal of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Hon. James E. Boyd, judge of the District Court of the United States, this 11 day of October, in the year of our Lord One thousand and nine hundred and twenty-one.

JAS. E. BOYD,
Judge of the District Court of the United States for the Western District of North Carolina.

Service of the above citation on appeal accepted, this the 11th day of October, 1921.

C. B. FETNER.

63 And on the 13 day of October, 1921, a stipulation was entered into.

Said stipulation filed October 14, 1921, is in words and figures as follows, to wit:

64 In the District Court of the United States, for the Western District of North Carolina.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS Vivian Cotton Mills, and Vivian Spinning Company, plaintiffs, respondents,

against

J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, AND Claude Moser, deputy collector of internal revenue, defendants, appellants.

Stipulation of counsel.

In the above-entitled case, it is agreed and stipulated by and between the appellant and counsel for the appellees, that:

1. Bill of complaint of John J. George, trading and doing business as Vivian Cotton Mills, and Vivian Spinning Company, plaintiffs.
2. Prosecution bond, dated July 6, 1921, John J. George, trading and doing business as Vivian Cotton Mills, and Vivian Spinning Company, and T. C. Summer, principals and surety.
3. Subpœna in equity, dated July 7, 1921, served on J. W. Bailey, collector of internal revenue and Claude Moser, deputy collector of internal revenue.
4. Bond for restraining order, dated July 7, 1921.
5. Temporary restraining order, dated July 8, 1921.
6. Affidavit of H. D. George, dated July 7, 1921.
7. Affidavit of W. J. Friday, dated July 7, 1921.
8. Affidavit of J. D. Frye, dated July 7, 1921.
9. Affidavit of L. W. McGinnas, dated July 7, 1921.
10. Affidavit of H. D. George, dated July 7, 1921.
11. Order restraining defendants from levying upon or selling the property of the complainants until further order of the court, signed by J. E. Boyd, U. S. judge, July 16, 1921.
12. Amendment to bill of complaint of John J. George, trading and doing business as Vivian Cotton Mills, and Vivian Spinning Company, plaintiffs.
13. Answer of defendants, J. W. Bailey, collector of internal revenue, and Claude Moser, deputy collector of internal revenue.
14. Order continuing cause until Monday, August 8, 1921, dated August 1, 1921, signed by J. E. Boyd, U. S. judge.

65 15. Order allowing defendants to withdraw demurrer, and continuing cause until Monday, August 8, 1921, signed by J. E. Boyd, U. S. judge, dated August 1, 1921.

16. Motion to dismiss cause of action, dated August 5, 1921, signed by U. S. attorney.
17. Order adjourning cause until Monday, August 15, 1921, signed by J. E. Boyd, U. S. judge, August 8, 1921.
18. Order adjourning cause until Monday, August 22, 1921, signed by J. E. Boyd, U. S. judge, dated August 15, 1921.
19. Order decreeing that temporary restraining order be made permanent, forbidding defendant to proceed to collect said assessment, dated August 22, 1921, signed by Judge J. E. Boyd.
20. Opinion of J. E. Boyd, U. S. judge.
21. Assignment of errors of defendants appellants, J. W. Bailey, collector of internal revenue, and Claude Moser, deputy collector of internal revenue.
22. Notice of petition for appeal, filed October 8, 1921, by U. S. attorney and counsel for defendants appellants.
23. Motion for appeal, filed day of October, 1921, by defendants appellants.
24. Citation on appeal, signed by J. E. Boyd, U. S. judge.
25. Stipulation.
26. Clerk's certificate.

shall constitute the complete record for the Supreme Court of the United States.

This the 14 day of October, 1921.

F. A. LINNEY,
Asst. United States Attorney for the Western District of North Carolina.
By HAMILTON C. JONES,
C. B. FETNER,
JOHN M. ROBINSON,
Attorneys for Plaintiffs Appellees.

66 And afterwards, to wit, on the 8 day of October, 1921, an election as to printing was filed.

Said election as to printing is in words and figures as follows, to wit:

67 In the District Court of the United States for the Western District of North Carolina.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS VIVIAN Cotton Mills, and Vivian Spinning Company, respondents,

against

J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, AND Claude Mosey, deputy collector of internal revenue, appellants.

Now come the defendants by their attorney, F. A. Linney, United States attorney for the Western District of North Carolina, and

elects that the record herein be printed by the clerk of the Supreme Court.

This October 8, 1921.

F. A. LINNEY,
United States Attorney and Counsel for Appellants.

68 UNITED STATES OF AMERICA, *Set.:*

I, R. L. Blaylock, clerk of the District Court of the United States for the Western District of North Carolina, do certify that the above and foregoing is a full, true, and complete copy of the record, assignment of errors, and all proceedings in the case of John J. George, trading and doing business as Vivian Cotton Mills, and Vivian Spinning Company against J. W. Bailey, collector of internal revenue, and Claude Moser, deputy collector of internal revenue, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said court. Done at office in Charlotte, North Carolina, this 14th day of October, A. D. 1921.

R. L. BLAYLOCK,
Clerk, U. S. District Court.

(Endorsed on cover:) File No. 28,545. W. North Carolina D. C. U. S. Term No. 590. J. W. Bailey, collector of internal revenue, et al., appellants, vs. John J. George, trading and doing business as Vivian Cotton Mills, et al. Filed October 19th, 1921. File No. 28,545.

INDEX.

AUTHORITIES CITED.

CASES.

MISCELLANEOUS.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

J. W. BAILEY, COLLECTOR of INTERNAL Revenue, et al., Appellants,
v.
JOHN G. GEORGE, TRADING AND DOING business as Vivian Cotton Mills, et al. — No. 590.

J. W. BAILEY, AND J. W. BAILEY, Collector of Internal Revenue for the District of North Carolina, Plaintiff in Error,
v.
DREXEL FURNITURE COMPANY. — No. 657.

APPEAL FROM AND WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF ON BEHALF OF APPELLANTS AND PLAINTIFF IN ERROR.

In each of these cases the same District Court has declared unconstitutional the excise tax imposed by Congress upon those employing child labor in mines, quarries, factories, and similar employments.

THE STATUTE.

The tax was imposed by section 1200 of the revenue act of 1918, approved February 24, 1919, 40 Stat., c. 18, p. 1138, which provides as follows:

> That every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (*a*) any mine or quarry situated in the United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (*b*) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock postmeridian, or before the hour of six o'clock antemeridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment.

Succeeding sections provide the basis upon which net profits are to be calculated and contain provisions the effect of which is that the mere accidental

employment of children under the permitted age shall not make the employer liable for the tax if he has in good faith taken the required precautions to prevent such employment.

THE FACTS IN THE VIVIAN COTTON MILLS CASE.

This suit was instituted on July 7, 1921, to enjoin the collection of a tax assessed under the law in question, the contention being that the statute is unconstitutional.

The bill, as amended, alleges that the plaintiff, John George, during the year 1919 manufactured cotton yarns at Cherryville, N. C., under the name of "Vivian Cotton Mills." The property and business had passed to the other plaintiff, the Vivian Spinning Company, before the institution of this suit.

The defendants are the Collector and the Deputy Collector of Internal Revenue for North Carolina.

On November 9, 1920, the Commissioner of Internal Revenue, acting under the provisions of the Child Labor Tax Law, assessed against the plaintiff George and his property, the Vivian Spinning Company, the sum of $2,098.06, due November 19, 1920, with a penalty of 5 per cent and interest at the rate of 1 per cent per month from the date due until paid, the Commissioner claiming that during the taxable year 1919 there had been employed in the Vivian Cotton Mills children under the age of fourteen and children between fourteen and sixteen years of age more than eight hours a day, after 7 p. m. and before 6 a. m., contrary to the statute.

The plaintiffs deny violation of the Act, and aver that the Commissioner advised them to file a claim for abatement of the tax, which claim was duly filed and disallowed, and the Collector was instructed to collect the tax by distraint proceedings. They further allege that, unless restrained, the Collector will sell plaintiffs' property, subjecting plaintiffs to a loss of approximately $50,000, in view of the low state of the market for cotton mills, cotton mill stocks, and cotton mill products, and to other great and irreparable damage.

The bill prays that the assessment be declared void and that defendants be enjoined from selling plaintiffs' property, it being alleged in the bill, as amended, that the statute is unconstitutional, (1) as depriving plaintiffs of their property without due process of law, in violation of the Fifth Amendment; (2) as denying to them the right to trial by jury, which is guaranteed to them by the Seventh Amendment; (3) as providing for the exercise of a power not delegated to the United States, but reserved to the States and to the people under the Tenth Amendment; and (4) as not constituting a tax measure but an attempted regulation of hours of labor and age of employees, under which a penalty is imposed and enforcement is proposed without giving the petitioners an opportunity to be heard, although they deny liability.

A temporary restraining order was issued as prayed. Thereafter defendants filed an answer to the bill.

The good faith of the revenue authorities in assessing the tax is shown by the averment in the answer that the plaintiffs had filed with the Collector a report that during the taxable year 1919 they had employed children within the ages referred to in the statute. This good faith exists even though the plaintiffs assert that if a report of such employment was made the report was erroneous.

The defendants also moved to dismiss the case for want of jurisdiction, on the ground that the court was forbidden by Revised Statutes, section 3224, to entertain a suit to restrain the collection of a tax.

The District Judge denied the motion to dismiss and made permanent the temporary restraining order. The court held that the Child Labor Tax Law was unconstitutional, as constituting an attempt on the part of Congress, not to collect revenue, but to control the internal affairs of the States.

It further held that a suit to prevent the collection of this tax, which was held unconstitutional, might be maintained, since to permit its collection would be to extend the power of Congress, through taxation, to legislation forbidden by the Constitution, especially the Ninth and Tenth Amendments. It also ruled that the statute provided not for a tax but for a penalty to prevent violation of its provisions, which penalty could not be enforced by assessment and distraint, and that therefore a permanent injunction should be granted.

The defendants were allowed a direct appeal to this court.

THE FACTS IN THE DREXEL FURNITURE COMPANY CASE.

This is a suit to recover a tax of $6,312.79, with interest, levied under the Child Labor Tax Law and paid under protest on October 20, 1921, it being asserted that that statute is unconstitutional.

The plaintiff, the Drexel Furniture Company, is a North Carolina corporation engaged in the manufacture of furniture. It is suing J. W. Bailey personally and as Collector of Internal Revenue for the District of North Carolina. He was Collector as aforesaid when the tax was paid. After that date, but before the institution of this suit, he resigned from his position and was succeeded by one Grissom.

Prior to September 20, 1921, plaintiff was informed that during the year 1919 it had employed in its business children under the age of fourteen. It thereupon presented to the Commissioner of Internal Revenue a claim for abatement of the assessment that it was proposed to make because of such employment. This claim was denied, for the reason that, upon investigation, it was found that during the taxable year 1919 plaintiff had employed and permitted to work in its factory a child under fourteen years of age.

On September 20, 1921, plaintiff received from the defendant, as Collector, notice of an assessment of $6,312.79, which was a tax of ten per cent on its net profits for the year 1919, together with a statement that if said tax was not paid on or before October 20, 1921, the penalty provided by the Child Labor Tax Act would be imposed.

In order to avoid said penalty and to prevent summary proceedings for the collection of the tax, the plaintiff paid the tax under protest. Thereafter the plaintiff filed a claim for refund, which was denied by the Commissioner of Internal Revenue on or about October 25, 1921.

Plaintiff prays for the recovery of the tax, together with interest thereon at six per cent from the date of payment, upon the ground that the taxing statute is unconstitutional because—

(1) It is not the laying or collecting of a tax duty, impost, or excise to pay the debts and provide for the common defense and general welfare of the United States as authorized by section 8 of Article 1 of the Constitution.

(2) It is not the laying or collecting of taxes on income which, by the Sixteenth Amendment, Congress has power to lay and collect without apportionment among the several States and without regard to any census or enumeration.

(3) It is within none of the powers delegated to Congress by the Constitution or any of its Amendments.

(4) The sole and intended effect of said statute is to prohibit the employment of child labor in manufacturing within the State, and is thus an attempt to control the conditions and methods of manufacture, and therefore is an attempted usurpation of the rights and powers of the various States.

(5) Its enactment by Congress is an attempted usurpation of the powers reserved to the States respectively or to the people, and is

therefore in violation of the Tenth Amendment.

(6) Its enforcement would deprive plaintiff of its property without due process of law, in violation of the Fifth Amendment.

The defendant demurred to the complaint; but the demurrer was overruled and judgment entered for the plaintiff for the amount claimed, the court holding that the statute was unconstitutional as effecting a regulation of a "purely internal affair of the States." This direct writ of error was then sued out.

ARGUMENT.

I.

The Jurisdiction of the Lower Court.

In the first of the two cases, the lower court was without jurisdiction. In the second case jurisdiction is not disputed.

In the first case (*Bailey* v. *George*) a bill was filed to restrain the Collector of Internal Revenue from collecting the tax.

Section 3224 of the Revised Statutes expressly provides:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The claimed invalidity of a tax has never been held by this court to remove the bar of the statute.

In the leading case of *Snyder* v. *Marks*, 109 U. S. 189, which was a suit to enjoin the collection of a revenue tax on tobacco, it was contended that the tax had been illegally assessed. This court nevertheless held that section 3224 barred the action. After reciting the history of the section and noting that the word "tax" as used therein comprehends an *illegal* as well as a legal tax (p. 192), the court said (pp. 193, 194):

> The inhibition of sec. 3224 applies to all assessments of taxes, *made under color of their*

> *offices*, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. * * * In *Cheatham* v. *United States*, 92 U. S. 85, 88, and again in *State Railroad Tax Cases*, 92 U. S. 575, 613, it was said by this court that the system prescribed by the United States in regard to both customs duties and internal revenue taxes of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the Government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by sec. 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed when those officers in the course of general jurisdiction over the subject matter in question have made the assignment [assessment] and claim that it is valid.

In *Dodge* v. *Osborn*, 240 U. S. 118, the appellant sued to enjoin the collection of taxes imposed under the income tax section of the tariff act of October 3, 1913, on the ground that the taxing statute was unconstitutional. This court, affirming the decree

below dismissing appellant's bill, held section 3224 applicable. After quoting with approval the language of the court in *Snyder* v. *Marks*, as set forth above, the court said (p. 121):

> This doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax *because of the alleged unconstitutionality* of the statute imposing it. *Shelton* v. *Platt*, 139 U. S. 591; *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Board of Public Works*, 172 U. S. 32; *Pacific Steam Whaling Co.* v. *United States*, 187 U. S. 447, 451, 452.

This section has been said by this court to have grown out of the "sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the Government depends for its continued existence." (*State Railroad Tax Cases*, 92 U. S. 575, 613.)

It is true that in *Dodge* v. *Osborn*, *supra*, the court assumed solely for the sake of argument that under some exceptional circumstances suits to enjoin the collection of a tax might be brought, but it added (p. 122) that—

> It is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstance its provisions are not applicable.

In the Vivian Cotton Mills case the tax was entirely prospective (sec. 1207 of Child Labor Tax Law) and to be paid out of profits. The manufacturer

should have made allowance for this tax before distributing the profits. Indeed, there is no allegation that the entire profits were distributed or that the manufacturer is not able to pay the entire tax from funds in bank. The only allegation is that if the tax is not paid, and the Government resorts to distraint proceedings, some of the manufacturer's property may be sold for an abnormally low return. Certainly the plaintiff has not shown such exceptional circumstances as would warrant the interposition of the court, even if, in spite of the express provision of section 3224 of the Revised Statutes, the court might under some "extraordinary and entirely exceptional circumstance" interpose to prevent the collection of a tax.

The District Court was of opinion that Revised Statutes, section 3224, had no application, because the tax in dispute was not in truth a tax, but a punitive penalty.

Where, on the face of the statute, a tax is nominally imposed, its validity as a tax can not be determined on a bill in equity to enjoin the collector. It does not matter whether the tax is constitutional or unconstitutional. It is still the policy of the law that the question must be determined by a suit for a refund.

Apart from this, can it be questioned that this is a tax? Congress has thus described it, and whether constitutional or otherwise by reason of its incidences, it is nevertheless an excise tax.

It may not be easy to draw a line of demarcation between a punitive penalty and a tax; but the line

of demarcation seems to be that, where the statute prohibits the doing of an act and as a sanction imposes a pecuniary punishment for violating the act, then it is a punitive penalty, and not a tax at all; but, where the thing done is not prohibited, but, with respect to the privilege of doing it, an excise tax is imposed, it is none the less a tax, even though it be, in its practical results, prohibitive. An import tax which absolutely prohibits the importation of a given commodity could not be said to be a punitive penalty, even though it operates to prohibit the importation as effectually as though it were a section of the criminal law prohibiting the importation under any circumstances. In the instant cases, the statute does not pretend to prohibit and does not in fact prohibit the employment of child labor. If a manufacturer desires to employ such labor, he is free to do so; but, if he does so, he must pay an excise tax for the privilege. Where the excise tax is prohibitive in amount, there may be little practical difference between such an excise tax and a penal prohibition; but, theoretically, they are different exercises of governmental power.

II.

The Doctrine of This Court as to the Constitutionality of the Law.

In the Drexel Furniture Co. case the jurisdiction of the lower court does not seem to be open to objection and this court is asked to determine the validity, under the Constitution, of the Child Labor Tax Law, and this, in turn, involves the question as to the extent, if any, to which this court may consider the motives which induced Congress, in the exercise of its power to tax, to select subjects for taxation.

This question is important, but not novel. If it can be regarded as still open to question, in view of the repeated and consistent decisions of this court from *Veazie Bank* v. *Fenno*, 8 Wall. 533, decided in 1869, down to *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, decided in 1921, then the question is of vast importance as a constitutional problem, for it confronts this court with a very serious dilemma.

If, on the one hand, it should hold that the exercise of an undoubted power of the Federal Government to impose an excise tax can be nullified by attributing to the framers of the law a purpose or motive to secure an ulterior end not sanctioned by the Constitution, then an intolerable burden may be put upon this court to determine as to future laws the purpose which Congress may have had in their enactment.

The great and solemn duty of adjudging invalid any enactment of Congress, which is in contravention to the Constitution, has already imposed a very heavy burden upon this great tribunal. It is obvious that if this court were now to assume the added burden of declaring a law unconstitutional, not because of that which it directly provides, but because of some inferable unconstitutional motive, which may have influenced Congress in its enactment, the work of this court would be more delicate than ever.

This is true; but candor requires me to add that it may also be true that if, in our complex civilization, when steam and electricity have intricately unified the relations of life, the powers of the Federal Government can be utilized to secure objectives which are beyond the scope of Federal power, then our constitutional form of Government may prove to be a less effective distribution of powers than is generally believed.

The repeated decisions of this court for the last half century indicate that the former view is the correct one. The contrary view is generally supported by the famous dictum of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 416. Let me quote, in parallel columns, this earlier and a later expression of this court.

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Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, at p. 423.

Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, *and is really calculated to effect any of the objects intrusted to the Government*, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. *This court disclaims all pretensions to such a power.*

Chief Justice White in McCray v. United States, 195 U. S. 27, at pp. 55, 56.

It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the Government, *where a wrong motive or purpose has impelled to the exertion of the power*, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. * * * *The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.*

Between these two statements, there is no necessary inconsistency; for it is to be observed that the latter portion of the extract from the opinion of Chief Justice Marshall above quoted does much to weaken the force of the preceding sentence. As applied to the instant case, the validity of the Child

Labor Tax Law can be sustained without violation to that which Chief Justice Marshall so forcefully said, for it is not contended that the Constitution prohibits an excise tax upon manufacturers, and, to the extent that manufacturers employ child labor, it would yield revenue to the Government and thus effect a governmental purpose.

Moreover, the extract from the opinion in *McCulloch* v. *Maryland*, above quoted, was merely *dictum* on the part of Chief Justice Marshall, for in that case he was not considering the effect of an act of Congress, but of an act of a State legislature, and the precise question now presented was not before him. The question in issue in *McCulloch* v. *Maryland* was whether the Constitution, by necessary implication, forbade a State to tax the agencies of the Federal Government.

It should be further noted that, in the later case of *Brown* v. *Maryland*, 12 Wheat. 419, 439, decided in 1827, the same Chief Justice also said:

> It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend upon the degree to which it may be exercised. *If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.*

Before applying the doctrine of these cases to the instant cases, it seems desirable to fix clearly the premises upon which this court will rest its judgment, and this may be done catechetically as follows:

Q. Has the Federal Government the power to impose an excise tax?

A. It certainly has.

Q. Does the statute in question impose an excise tax?

A. It certainly does; for it provides that manufacturers of a certain class "shall pay for each taxable year in addition to all other taxes imposed by law an excise tax equivalent to 10 per cent of the entire net profits," etc.

Q. Is this a tax in fact as well as in form?

A. It certainly is, and the instant cases prove it; for, in the first case, a suit is brought to restrain a Government official from collecting the tax, and, in the second case, the plaintiff below sues to recover a tax assessed under the statute and already paid into the Treasury of the United States.

Q. What, then, in the last analysis, is the question?

A. It is this: If the Congress imposes an excise tax, can it be invalidated on the *assumption* that the real motive of Congress was not to collect revenue but to regulate child labor?

Assuming that Congress was actuated by the motive thus imputed to it, does the case fall within the doctrine as announced by Chief Justice Marshall, and above quoted?

I think not. Such an excise law is not expressly prohibited, and as it does raise revenue, if a manufacturer exercises his undoubted right to employ child labor, it, in the language of Chief Justice

Marshall, "is really calculated to effect any [one] of the objects intrusted to the Government."

Certainly such a case falls expressly within the doctrine, as announced by Chief Justice White, and above quoted, that this court will not "restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be executed."

In considering the effect of motive or objective upon the exercise of delegated power, care must be taken to distinguish between the power of this court to invalidate a State statute when it invades the province of the Federal Government and the power of this court to nullify a law passed by Congress, a coordinate branch of the Government. Chief Justice Marshall, in the same case of *McCulloch* v. *Maryland*, 4 Wheat. 416, 435, clearly drew attention to the distinction between them:

> It has also been insisted that, as the power of taxation in the General and State Governments is acknowledged to be concurrent, every argument which would sustain the right of the General Government to tax banks chartered by the States will equally sustain the right of the States to tax banks chartered by the General Government.
>
> But the two cases are not on the same reason. The people of all the States have created the General Government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their

> representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the Government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a Government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a Government declared to be supreme and those of a government which, when in opposition to those laws, is not supreme.

Chief Justice White dwelt further on this distinction in *McCray* v. *United States* (195 U. S. 60). The late Chief Justice fully conceded that when a State adopts a law, the necessary effect of which is to exercise a power granted by the Constitution to the Government of the United States, it must follow that the act is void. But he pointed out that this is due to the paramount nature of the Constitution of the United States. Under Article VI, where there is any conflict between State and Federal activity the Federal Government is supreme. Where, however, Congress in exerting its power to levy taxes deals with a subject, which might also be regulated by the police power of the State, the Federal statute is not nullified by any power which the State might otherwise possess.

Before citing the many authorities in which this court has disclaimed any power to sit in judgment upon the motives with which Congress exercises its delegated powers, let me say that I do not concede that no fiscal reason can be assigned, which justifies the Child Labor Law as a revenue measure. It is notorious that child labor is cheap labor, and this being so, Congress may have considered this privilege of cheaper production as a fiscal reason for the tax.

However, I do not stress this point, for I prefer to add, in the spirit of candor, that if this court is empowered to consider the *motive* of Congress, then the contention that the *dominant* motive of Congress in passing this Statute was to make the employment of child labor expensive by reason of added taxation is not unreasonable.

If so, it is not the first time in the history of taxation that taxes have been imposed for other than fiscal purposes. The question is, not what the motive of Congress is, but does this statute impose an excise tax; and, if so, whether the imposition of such a tax has been forbidden by the Constitution.

Certainly by no *express* prohibition, and it remains to inquire whether it is by an *implied* prohibition.

The doctrine of implied *powers* is a natural and necessary one; but the doctrine of implied *limitations* is one, for which there is little countenance in either the text of the Constitution or its judicial interpretation.

Few, if any, implied limitations upon expressly delegated powers have ever had the sanction of this

court. The greatest of all was that, which was recognized in *McCulloch* v. *Maryland*, and, so far as my knowledge goes, it is the only implied limitation upon the taxing power, and it was decided from an obvious and imperative necessity, for, neither the Federal Government nor the constituent States could possibly continue to exist if either had the power to tax the agencies of the other out of existence.

With this exception, however, this court has said repeatedly that the power to tax is only restricted by the *express* prohibitions of the Constitution, and none can be implied where, as in the instant case, they depend upon a question of fact, viz, the motive for the exercise of the delegated power.

In *In re Kollock* (165 U. S. 526), this court, speaking through Chief Justice Fuller, said:

> The act before us is *on its face* an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, *its primary object must be assumed to be the raising of revenue.* (165 U. S. 536.)

Again, in *McCray* v. *United States* (195 U. S. 27, 50), this court, in one of the late Chief Justice's most powerful opinions, said "that the acts in question on their face impose excise taxes which Congress had the power to levy is so completely established as to require only statement." In that case Chief Justice White, anticipating the argument in the instant case, very forcefully said (195 U. S. 54–59):

It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that, because a particular department of the Government may exert its lawful powers *with the object or motive of reaching an end not justified*, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. *But this reduces itself to the contention that, under our constitutional system, the abuse by one department of Government of its lawful powers is to be corrected by the abuse of its powers by another department.*

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the Government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions.

And again:

It is of course true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another

> department of the Government where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies not in the abuse by the judicial authority of its functions but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power.

And again:

> The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said, from the beginning no case can be found announcing such a doctrine, and on the contrary the doctrine of a number of cases is inconsistent with its existence. As quite recently pointed out by this court in *Knowlton* v. *Moore* (178 U. S. 41, 60), the often-quoted statement of Chief Justice Marshall in *McCulloch* v. *Maryland*, that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power *because of the destructive effect of the exertion of the authority.*

The Chief Justice then proceeds to quote with approval the following utterances of this Court, which we requote as follows:

In the License Tax Cases (5 Wall. 462) this Court said:

> It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, *and thus only*, it reaches every subject, and may be exercised at discretion.

In *Pacific Insurance Co.* v. *Soule* (7 Wall. 433), referring to the unlimited nature of the power of taxation conferred upon Congress, the court observed (p. 443):

> Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the Government.

And after referring to the express limitations as to uniformity and articles exported from any State, the court remarked (p. 446):

> With these exceptions, the exercise of the power is, in all respects, *unfettered*.

In *Austin* v. *The Aldermen* (7 Wall. 694) the court again declared (p. 699) that

> The right of taxation, where it exists, is necessarily *unlimited* in its nature. It carries with it inherently the power to embarrass and destroy.

In the leading case above referred to (*Veazie Bank* v. *Fenno*, 8 Wall. 533), where a tax levied by Congress on the circulating notes of State banks was assailed on the ground that the tax was intended to destroy the circulation of such notes, and was, besides, the exercise of a power to tax a subject not conferred upon Congress, the court said, as to the first contention (p. 548):

> It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.
>
> The first answer to this is that the judicial can not prescribe to the legislative department of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it can not, for that reason only, be pronounced contrary to the Constitution.

In *Knowlton* v. *Moore* (178 U. S. 41) the cases referred to above were approvingly cited, and the doctrine which they expressed was restated.

In *Treat* v. *White* (181 U. S. 264), referring to a stamp duty levied by Congress, the court observed (p. 269):

> The power of Congress in this direction is *unlimited*. It does not come within the

> province of this court to consider why agreements to sell shall be subject to the stamp duty and agreements to buy not. It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other.

In *Patton* v. *Brady* (184 U. S. 608), considering another stamp duty levied by Congress, the court again said (p. 623):

> It is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed.

In *McCray* v. *United States* (195 U. S. 59; see also 60–62) Chief Justice White answered the contention that, because the effect of the tax then considered might be to destroy or restrict the manufacture of the article taxed, the power to levy the tax did not exist. This, he said—

> is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.
>
> Since, as pointed out in all the decisions referred to, *the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.*

In the more recent case of *Flint* v. *Stone Tracy Co.* (220 U. S. 107, 153, 154), the court said, by Mr. Justice Day:

> The Constitution imposes only two limitations on the right of Congress to levy excise taxes; they must be levied for the public welfare and are required to be uniform throughout the United States. * * * The limitations to which [Chief Justice Chase, in the *License Tax Cases, supra*] refers were the only ones imposed in the Constitution upon the taxing power. * * * The limitation of uniformity was deemed sufficient by those who framed and adopted the Constitution. The courts may not add others.

And in *United States* v. *Doremus* (249 U. S. 86, 94), again speaking by Mr. Justice Day, the court said:

> The only limitation upon the power of Congress to levy taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared that it can not add others. Subject to such limitation Congress may select the subjects of taxations and may exercise the power conferred at its discretion. * * * Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the State.

The case of *Hammer* v. *Dagenhart* (247 U. S. 251) does not overrule this long-accepted doctrine.

In that case a statute was passed, as a regulation of commerce, which forbade the transportation in such

commerce of goods made at a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen had been employed or children between the ages of fourteen and sixteen had been worked more than eight hours in a day.

In that case it was plausibly contended that the real purpose of Congress was not so much to regulate the transportation of commodities as to regulate the method of their production—a matter which concededly is within the exclusive power of the States. Nevertheless, on its face, the statute did provide that given commodities to which child labor presumptively contributed could not be carried in interstate commerce.

The question presented itself whether such a prohibition of the right of transportation could be justified when its apparent purpose was to restrain the producers of the commodities thus transported from employing child labor.

Distinguishing the lottery statute, the pure food and drugs act, the white slave traffic act, the Reed Act, in all of which cases the power to regulate commerce was utilized to accomplish moral ends concededly within the police powers of the States, this court held that in these instances "the use of interstate transportation was necessary to the accomplishment of harmful results," and therefore because of the intimate connection between the sale of such harmful commodities and the transportation thereof these statutes were sustained. This court then proceeded to say (p. 271):

> This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. *The act in its effect does not regulate transportation among the States*, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. * * * When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power.

The decision was rested upon the ground of want of power and not upon motive in exercising a power. This conclusion was reached by a nearly evenly divided court, four Justices concurring in Mr. Justice Day's opinion and four dissenting.

It can not be questioned, and should be freely conceded, that, as a result of this decision, Congress enacted the present law, by which the same end was sought to be accomplished through the greater power of taxation. The substantial difference between the two statutes is that in the former case the prohibition of child labor was sought to be secured by denying to the employers the privileges of interstate traffic, while in the present case the same end is sought by imposing upon the employer a tax in ex-

cess of that imposed upon like manufacturers, who do not employ child labor.

In the former case there was a complete denial of the vital right of interstate transportation, without which many manufacturers could not continue to employ child labor, to products which may never have been manufactured by such labor, while in the instant case an excise tax is imposed upon the employer of child labor. In the former case no reasonable relation was found between interstate transportation and child labor, while a relation always exists between a tax and the subject matter thereof.

It has always been recognized that the right to tax is exceptional in the sweep of its power because of its vital connection with the right of the Government to exist, and because, while the Federal commercial power only relates to interstate and foreign commerce, the taxing power comprehends all taxable objects, whether interstate or intrastate.

III.

Inevitable Incidences of Laws.

In considering this question of invalidating the exercise of a delegated power by reason of its assumed motives or objectives, a distinction should be made between the following classes of cases:

1. Where the exercise of a Federal power has an unquestioned but incidental effect upon some right reserved to the States.

In this case obviously the Federal statute can not be invalidated. Even in the relatively primitive con-

ditions, under which the Constitution was framed, it was inevitable that the exercise of Federal powers would react upon State rights as the exercise of State rights would react upon Federal powers. To-day, when the equilibrium between these two systems of government has been greatly disturbed by the centripetal influences of economic forces, few laws could be passed, either by State or Nation, that would not have such a reflex action. State and Federal powers do not run in parallel lines, which never meet. They run in interlacing zig-zags.

2. Instances where it is clear that Congress in passing a Federal statute not only has a legitimate Federal purpose but may also have been actuated by some motive beyond the province of the Federal Government.

In this case, there is also no power to invalidate a Federal statute. This court could not, even if it would, weigh different motives. It is enough that the statute is an exercise of power for a lawful purpose. That there may have been other and ulterior motives or purposes can not affect the validity of the legislation.

3. Cases where, from the history of the legislation, there is reason to believe that the power was exercised, not to accomplish some purpose intrusted to the Federal Government by the Constitution, but wholly to accomplish by indirect action some purpose which was not within its scope.

Here, too, this court can not invalidate a statute, because, however plausible the inference may be in a given case of an ulterior and unconstitutional motive, it can not judge the motive and object of Congress, either by declarations in debate or even by the history of the legislation. The good faith of Congress in passing the law must be assumed.

4. Cases in which this court can indubitably deduce *from the language of the act* that the exercise of the power was not to accomplish *any* purpose intrusted to the Federal Government, but rather some purpose beyond the scope of Federal power.

Here, if in any case, this court may nullify the law. Such a case was *Hammer* v. *Dagenhart*, *supra*.

Can such a case arise in a taxing statute? Can it be safely adjudged that Congress did not intend to impose a tax, when it expressly says that it does? In *McCray* v. *United States*, *supra*, this court answered this question in the negative.

In the instant case it may be that Congress intended incidentally to regulate child labor by the exercise of its taxing power, but this is one of the cases where Congress, having lawfully chosen the subjects for taxation, its exercise of an undoubted power cannot be challenged, because such tax may have an incidental effect upon some reserved rights of the States. If this were not so, many Federal taxes would be assailed, because it has always been true that in levying taxes Congress has taken into consideration matters

that are beyond the scope of the Federal Government. Before the Revolution the regulations of the Lords in Trade and the impost duties imposed by the Lords in Trade were always used, not for fiscal purposes but as means of regulating commerce.

Following this method of regulating commerce, import duties, and at times internal taxes, have been levied from the beginning in order to accomplish ends, sometimes moral and sometimes economic, which were in themselves not within the scope of Federal power.

Thus when liquor was a permissible commodity it was always recognized that to impose heavy excise taxes upon its sale accomplished a moral purpose, and yet, until the Eighteenth Amendment, the morality of drinking was not a question with which the Federal Government had any concern. But no one ever questioned that a tax which imposed a restrictive influence upon the sale of liquor, and was intended to do so, was none the less a valid tax because of an ulterior moral purpose.

So also, in the leading case of *McCray* v. *United States* (195 U. S. 27), where it may well be supposed that Congress had sought to attain an economic end by means of a taxing statute, this court refused to declare the legislation unconstitutional.[1]

[1] Well-known examples of the use of the taxing power in connection with social or economic ends are the protective tariff system; the tax on foreign-built yachts: *Billings* v. *United States* (232 U. S. 261); on notes of State banks: *Veazie Bank* v. *Fenno* (8 Wall. 533); on importation of alien passengers: *Head Money Cases* (112 U. S. 580); graduation

Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the State. The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress, that is sufficient to sustain it. (*United States* v. *Doremus*, 249 U. S. 86, 93, 94.)

Reverting to the *License Tax Cases*, *supra*, it is clear that they are analogous to the instant cases. The court there conceded that "Congress has no power of regulation *nor any direct control*" over the domestic trade of a State. "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature." (5 Wall. 470, 471.) But the court nevertheless decided unanimously that Congress had power to impose an excise tax upon the sale of liquor wherever the sale was permitted.

So also the question whether child labor may be employed or not is a matter for the determination of

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of taxes: *Magoun* v. *Bank* (170 U. S. 283); *Knowlton* v *Moore* (178 U. S. 41); *Brushaber* v. *United States* (240 U. S. 1) on oleomargarine: *In re Kollock* (165 U. S. 526); *McCray* v. *United States* (195 U. S. 27); on sugar refiners: *American Sugar Refining Co.* v. *Louisiana* (179 U. S. 89). Well-known uses of the power in connection with moral ends are taxes on dealers in liquors and lottery tickets: *License Tax Cases* (5 Wall. 462); on dealers in narcotic drugs: *United States* v. *Doremus* (249 U. S. 86).

the States. But the tax law in the instant cases does not regulate the internal affairs of the States any more than did the taxing statute which was sustained in the *License Tax Cases*. It does not prohibit child labor. It merely requires a manufacturer who employs child labor to pay a tax not imposed upon one who does not employ child labor. Certainly Congress may select the subjects of taxation.

As Mr. Justice Story pointed out in his Commentaries on the Constitution:

> *The power to lay taxes is not by the Constitution confined to purposes of revenue.* In point of fact, it has never been limited to such purposes by Congress; and all the great functionaries of the Government have constantly maintained the doctrine that it was not constitutionally so limited. (Sec. 973.)
>
> The language of the Constitution is, "Congress shall have power to lay and collect taxes, duties, imposts, and excises." If the clause had stopped here, and remained in this absolute form (as it was, in fact, when reported in the first draft in the Convention), there could not have been the slightest doubt on the subject. The absolute power to lay taxes includes the power in every form in which it may be used, and for every purpose to which the legislature may choose to apply it. This results from the very nature of such an unrestricted power. *A fortiori* it might be applied by Congress to purposes for which nations have been accustomed to apply it. Now, nothing is more clear, from the history of commercial nations, than the fact that the

taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles for the encouragement and protection of domestic products and industry; for the support of agriculture, commerce, and manufactures; for retaliation upon foreign monopolies and injurious restrictions; for mere purposes of State policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes as a bounty upon an infant manufacture or agricultural product; sometimes as a temporary restraint of trade; sometimes as a suppression of particular employments; sometimes as a prerogative power to destroy competition, and secure a monopoly to the Government. (Sec. 965.)

IV.

Implied Limitations.

It is true, as previously stated (*ante*, p. 22) that this court has consistently recognized, as a necessary implication of the Constitution, that the Federal powers can not be used to destroy the purely governmental agencies of the States. But this necessary limitation, without which our dual form of government could not continue, is limited to purely governmental agencies and can not be extended to the nongovernmental activities of the people of the States or even those of the States as political entities.

This is shown by *Veazie Bank* v. *Fenno*, 8 Wall. 533. The court there held that while the State of Maine could charter a banking corporation, yet that corporation was not a governmental instrumentality and its currency was held to be subject to a prohibitive Federal tax. Similarly, where railroad corporations chartered by Congress claimed immunity from State taxation, it was held that the mere fact that they were chartered by the Federal Government, and were an instrument of interstate commerce, did not save their property from taxation by the States. (Authorities cited in *Choctaw, O. & G. R. Co.* v. *Mackey*, decided by this court June 1, 1921, 41 Sup. Ct. 582, 583.)

The most striking illustration of this is the case of *South Carolina* v. *United States*, 199 U. S. 437, where the government of South Carolina made a monopoly of the sale of liquor and yet, although the agents of the State were its officials, their sales of liquor as such officials were held to be subject to Federal taxation. The powerfully reasoned opinion of Mr. Justice Brewer in this case, to the effect that when a State leaves its purely functional operations as a sovereign and engages in what is normally regarded as private business, it is not, as to such activities, exempt from a Federal tax, shows conclusively that the mere fact that a State has, among its powers, the right to determine the conditions of child labor can not affect the power of the Federal Government to impose an excise tax upon the employer for the privilege of doing business in that way.

This excise tax may be unreasonable, arbitrary, or oppressive, but, as the cases hereinbefore cited show, such considerations are within the discretion of Congress, and that body, representing in a peculiar way the popular will, has the exclusive right of determining the reasonableness of selecting one class for taxation and exempting another, with all the attendant consequences of such discrimination. If it uses its power tyrannically, the remedy can only be with the people who elect the members of Congress.

Nowhere has this been stated more emphatically than in the *Chinese Exclusion Case* (130 U. S. 581, 602, 603), where the court said by Mr. Justice Field:

> If the power mentioned is vested in Congress, any reflection upon its motives, or the motives of any of its members in exercising it, would be entirely uncalled for. *This court is not a censor of the morals of other departments of the Government;* it is not invested with any authority to pass judgment upon the motives of their conduct.

In the much more recent case of *Smith* v. *Kansas City Title & Trust Co.* (255 U. S. 180, 210), decided at the last term, this court said, by Mr. Justice Day:

> But, it is urged, the attempt to create these fiscal agencies, and to make these banks fiscal agents and public depositaries of the Government, is but a pretext. But nothing is better settled by the decisions of this court than that when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the Government to question its motives.

V.

Reasons for Doctrine.

Thus far I have argued the case on the authorities, but as cases of this class are arising with increasing frequency, it may be well to state again the reasons for the doctrine.

I believe that the scope of the judicial power, in the matter of invalidating legislation, has been somewhat obscured, because the question has not been fully considered in the light of the history of the times when the Constitution was drafted.

It is noticeable that, in *Marbury* v. *Madison*, Chief Justice Marshall makes no reference to the history of the Constitutional Convention and did not base his argument upon the teachings of history. This, indeed, is true of all his great opinions, and his example in reaching conclusions upon constitutional questions by reasoning exclusively from the text of the instrument has greatly influenced his successors in this great court.

All of Marshall's great opinions were written before the details of the Constitutional Convention became public property through publication in 1840 of Madison's Debates. Up to that time little was known as to the deliberations of the Constitutional Convention, and all that was known was little more than gossip and hearsay.

The fact remains, however, that a great historical document can not be considered fully except in the light of the history of the times from which it was

evolved. It was a wise saying of one of the great mediæval legal scholars that the Institutes and Digest of Justinian could not be understood without a knowledge of the history of the times; for "*jurisprudentia sine historia cæca est*," and as a very scholarly Chicago lawyer (John M. Zane, Esq.) recently added, "this is as true to-day as when Cujas lifted the discussion of Roman law above the dry reasoning of the Glossators."

Similarly, a Shakesperian scholar knows that as much light is thrown upon occasional obscure passages in the First Folio by the history of the times as is thrown by a mere reading of the text.

It is, I believe, a common error that, when the Convention of 1787 framed the Constitution, it not only vested a larger power in the judiciary to nullify as *ultra vires* an unconstitutional act, but that, in fact, it created the right which was, as is so commonly stated, a novel contribution to the science of jurisprudence. This, I believe, to be an error; for, in the two countries from which, institutionally, the United States derives its constitutional form of government, there was, prior to the Convention of 1787, a clear recognition of the power of the judiciary to pass upon the *ultra vires* character of a law.

In England the common law was thus stated by Lord Coke in 1610, in *Bonham's Case*, 8 Coke's Reports, 118:

> And it appears in our books that in many cases the common law will control acts of Parliament and sometimes adjudge them to be utterly void; for when an act of Parliament is

> against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void.

This doctrine had the approval of three succeeding Chief Justices—Hobart, Holt, and Popham—and was recognized as the law in Bacon's Abridgment, Comyn's Digest, and Viner's Abridgment. Blackstone gave it some recognition in the Commentaries. "Free John" Lilburne, in the time of the Long Parliament, successfully asserted the invalidity of a statute when it offended fundamental rights.

The constitutional struggle of the Parliament against the Parliament's misuse of its power of taxation was based on the same fundamental consideration.

In the Convention of 1787 three different attempts were made to give to the judiciary complete power of revision over the laws of the Nation and the States in conjunction with the executive. On June 6th this proposition, although supported eloquently by Wilson, Madison, Ellsworth, Mason, Gouverneur Morris, and others, was voted down by a vote of 8 States to 3. On June 21st it was again discussed at length, and this time it was voted down by a bare majority of the vote of one State. On August 15th Mr. Madison, who was the chief proponent of this power of the judiciary, again brought up the plan in a modified form, and this time it was voted down by a vote of 8 States to 3. So opposed were the Framers to an absolute re-

visory power by the courts, that members objected to the inclusion in the Judiciary Article of the words "under the Constitution" and that, when the Judiciary Article of the Constitution was finally passed, it was with the tacit understanding of all members that the power to be exercised by the Court was confined to cases of a "judiciary" character, and not to "extra-judicial" questions, or, as we would now say, political questions. (See Madison's Journal, August 27.)

On August 27, when the eleventh article of the draft Constitution was under consideration, and the above text was reached, the following proceedings took place as reported by Madison:

> Dr. Johnson moved to insert the words "*this Constitution and the*" before the word "laws." Mr. Madison doubted whether this was not going too far, to extend the jurisdiction of the court *generally to cases arising under the Constitution*, and whether it ought not to be *limited to cases of a judiciary nature. The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department.* The motion of Dr. Johnson was agreed to, *nem. con., it being generally supposed that the jurisdiction given was constructively limited to cases of a judiciary nature.*

The beginning of the section thus then read:

> *The jurisdiction of the Supreme Court* shall extend to all cases arising under this Constitution and the laws of the United States and treaties made or which shall be made under their authority.

In spite of the true construction of the amended text being generally supposed in the convention to mean that the jurisdiction of the Supreme Court, in cases arising under the Constitution, was extended to cases of a "judiciary" nature and not extended to all cases generally, whether judicial or extrajudicial, Madison was not satisfied. Not long after, while this section was still under consideration, he says:

> Mr. Madison and Mr. Gouverneur Morris moved to strike out the beginning of the third section, "The jurisdiction of the Supreme Court," and to insert the words, "judicial power," which was agreed to *nem. con.*

The section thus then read:

> *The judicial power* shall extend to all cases arising under, etc.

The Constitution itself now reads:

> The judicial power shall extend to all cases *in law and equity* arising under, etc.

Contemporaneously with this fight in the Constitutional Convention, there was witnessed in France, the other country from which we developed our institutions, the culmination of a struggle of centuries between the political branch of the Government and the Courts. The highest Court of France was known as the "Parlement." From it, our English constitutionalism derives the name of "Parliament;" but the Parlement of France was a judicial body, with legislative powers of revision, while in England, the Parliament is a legislative body, with some incidental judicial powers. The French courts con-

tended that no law had validity until the courts "registered" it. Thus arose a three-century struggle between the king and the courts. (See appendix for details.)

The sequel in both countries is interesting. In France, as a result of the Revolution, all power was vested in the people. The monarchy was abolished, the executive was stripped of power, and the judiciary became elective and was also stripped of its revisionary power over legislation. In England, the Coke doctrine of the revisory power of the judiciary gave place to the present doctrine of the legal omnipotence of Parliament.

In our Nation, as we have seen, the Constitutional Convention voted down any proposition that the judiciary should have an absolute revisionary power over the legislature, which as the representative of the people was regarded as the most direct organ of their will. Both France and the Framers of our Constitution accepted the doctrine of Montesquieu that wherever legislative and judicial powers are concentrated in any one body of men, only tyranny could result. Probably this belief inspired Jefferson in his great distrust of the Federal judiciary and his hatred toward Chief Justice Marshall, for Jefferson was profoundly influenced by the doctrines of the French philosophers, and especially by those of Montesquieu.

Our Constitution created a truer equilibrium of power than France had at that time. We denied to the judiciary the full power of revision over laws, and

thus stripped them of legislative functions. As interpreted, our Constitution provides that the judiciary has no power of revision whatever, except when a concrete case is presented between litigants, and if, in such a case, an *invincible, irreconcilable, and indubitable repugnancy* develops between a statute and the Constitution, the Court applies the Constitution, and thus virtually nullifies the statute. It does not otherwise invade the field of political discretion.

VI.

Political Discretion.

Under our dual form of government, it is inevitable that there should be conflicting incidences of laws. Thus in the most difficult of our problems—the problem of distributing the power over commerce between interstate and intrastate commerce—it is inevitable that all State commercial regulations have an incidental effect upon interstate commerce, and that all Federal trade regulations have an incidental effect upon intrastate commerce.

So, too, it is inevitable that, when the Federal Government exercises its comprehensive power to tax, the incidences of the tax must often affect subjects which are within the reserved rights of the States. An attempt to avert this is as futile as Mrs. Partington's attempt to sweep up the Atlantic Ocean with a mop and broom.

As a result, there are many laws—Federal and State—which are *politically anti-constitutional*, without being *juridically unconstitutional*.

This distinction may be imperfectly grasped by the general public. The impression is general—and I believe that it is a mischievous one—that the judiciary has an unlimited power to nullify a law if its incidental effect is in excess of the governmental sphere of the enacting body. Our whole constitutional jurisprudence, with respect to the dual power over commerce, shows that this is not the fact.

Moreover, there is a large field of political action, into which the judiciary may not enter. It is the sphere of action which may be described as that of political discretion. The motives and objectives of an exercise of a delegated power are always matters of political discretion.

A delegated power can undoubtedly be exercised for a purpose that is within the scope of the enacting body's functions; but its incidences may also be without it. This is as true of the executive as it is of the judicial, and it is true of the legislative. The executive, in the broad discretion that it exercises, may often exercise many powers for an unconstitutional purpose, or in a manner that is opposed to the theory of our Government.

The Executive—although not above the law—can not be subjected generally to the revisory power of the judiciary in many cases of political discretion, even when he is carrying out a challenged law. This was decided by this Court in a case brought in 1867 by a sovereign State (Mississippi) against the President of the United States, to enjoin him from enforcing the Reconstruction

laws, which he had himself vetoed as unconstitutional. (*Mississippi* v. *Johnson*, 4 Wall. 475.)

After a very elaborate argument, this Court, without determining the constitutionality of the Reconstruction laws, wisely held that it would be subversive of the Government for the judiciary to enjoin the President, even if he were embarked on an unconstitutional course of action. The remedy was not in the judiciary, but in Congress, where the House could impeach him and the Senate, as high court of impeachment, could remove him. If they would not act, the ultimate remedy was in the sovereign people.

The same is true of the judiciary. Its actions can not be challenged by imputing to it an ulterior unconstitutional motive. In the Dred Scott decision it was believed throughout the country that this court, in nullifying the Missouri Compromise, did so in order to settle, once for all, the question of slavery, and put it beyond the power of political agitation. If so, such action was anti-constitutional. Even had this been so, the Dred Scott decision remained as a law. If this Court considered a question of political expediency in nullifying a political act, which had been the law for many years, the only remedy was with the people. Lincoln recognized this in accepting the decision *as law* but protesting against it as a continuing *political principle*. The agitation against the Dred Scott decision was possibly the principal cause, next to slavery itself, in precipitating the greatest civil war in history.

If this be true of the Executive and the Judiciary, t is far more true of the Legislature; for the power that makes the laws is peculiarly the representative of the popular will. Undoubtedly if it passes a law, which the Constitution did not empower it to pass, the Supreme Court, in a concrete case between litigants, may nullify it as *ultra vires*. This is due to the absence of *any* power whatever to do the thing.

So delicate a power has been rarely exercised by this Court. In all the thousands of laws that Congress has passed, in the 133 years of our existence as a Nation, not more than thirty laws of Congress have ever been nullified.

It is true that at least a thousand laws of the States have been nullified; but, as previously shown (*ante*, p. 19), the two cases are not in analogy; for the power to nullify a State law arises from the supremacy of the Federal Government, within the scope of its power; but the power of one branch of the Federal Government to nullify a law which has been passed by that coordinate branch of the Government, which is authorized to make laws, does not present the problem of a superior and an inferior, but of a coordinate department of our dual form of Government.

VII.

The Field of Operation True Test.

Therefore the only question can be, when the validity of a law is under question:

Is such a law *in its field of operation* within the delegated power of Congress? The motives of Con-

gress and the incidences of the law are beyond judicial censorship.

In exercising such powers, there is, as with the Executive, an indefinite field of political discretion. Into that field the Judiciary is powerless to go without usurping the very revisionary power over legislation which the framers of the Constitution refused to give to it.

Undoubtedly Congress can pass many laws from motives which are hostile to the spirit, and even to the letter, of the Constitution and which are, therefore, politically anticonstitutional.

For example, if Congress passes a law with the real purpose to coerce the Executive into doing or leaving undone some act which the Executive is constitutionally free to do or leave undone, then the act is politically anticonstitutional. For example, the President has the power to nominate officers of the United States. Suppose that Congress refuses to pass any supply bills unless the President shall nominate designated officials as prescribed by Congress. The act would be plainly politically anticonstitutional. It is the duty of Congress to vote supplies to the Executive; for without such supplies the Government cannot continue. But there is a broad political discretion as to the time when, and the methods by which, the supplies will be granted, and if, in selecting such times and methods, it attempts to coerce the Executive, the Judiciary is impotent to interfere, and the only remedy for such recalcitrancy is with the people.

Congress may pass many laws within the scope of its powers, and yet the real motive or objective of the laws may be the accomplishment of a design which is equally in excess of its true functions and plainly an attempt, by indirection, to accomplish an unconstitutional end.

This is deplorable. It is anticonstitutional. It may be subversive of our form of government; but, here again, the only remedy is with the people.

If the Judiciary attempts to impugn the motives and objectives of a coordinate branch of the Government, whether it be Executive or Legislative, it attempts a futile and impossible task.

In the first place, the motives and objectives are, in nearly all cases, a matter of conjecture. To impute a wrongful motive, where there may be a rightful one, is an intolerable impeachment by one branch of the Government of the work of another. In the case of the Executive, the motive or objective may be in a single brain and may be gathered by his declarations; but in the case of the Legislature, the Judiciary is dealing with a hydra-headed body, and when Congress passes a law it is impossible to determine what motives influenced the various members of the Legislature, or even a majority thereof.

Apart from the futility of the inquiry, however plausible a conjecture may be, there remains a far graver consideration that, while the human mind is what it is, it is impossible to prevent officials, in discharging their duties, from taking into account motives and objectives of a political nature.

Since parliaments began, men who are entrusted with the duty of legislation have, in giving their assent or dissent, considered the incidences of the proposed law—whether social, economic, or moral. This is inevitable. The legislator would not be a statesman who did not take into account what such incidences would be.

This is peculiarly true of all taxing measures. They have rarely, if ever, been levied solely with reference to fiscal necessities. From time out of mind the body that imposed taxes has considered all the varying influences upon the public welfare that such a levy would incidentally entail, and frequently the social, economic, or moral effect of the tax is often a far more influential consideration with the legislature than the mere question of revenue.

As I have shown in other briefs, nothing was more obvious to the Founders of this Republic than the distinction between a tax which was used to regulate trade and a tax that was used to raise revenue. This was the very foundation of our struggle with the mother country. The leaders of the Colonists never disputed that, if Parliament passed a law to control trade—in many respects to prohibit trade altogether—whereby no revenue would result, that it was a constitutional exercise of power. Their real objection was to a tax whose real purpose was to raise revenue from the Colonies for the purposes of the Imperial Treasury; and it was to that kind of tax and that kind of laws that they applied

the maxim: "Taxation without representation is tyranny."

Applying these considerations to the instant case, I argue that, however plausible the conjecture, this Court is powerless to say judicially that the motive of Congress in levying the tax under consideration was not to impose a tax, but to regulate child labor; and I further argue that, even if it were, that the fact remains that if, in levying the tax upon manufacturers that employ child labor, it did so with a recognition that such a tax might result in no revenue at all, and virtually prohibit the employment of child labor, that such purpose, while it may be *politically anti-constitutional*, in the sense that it may indirectly and incidentally regulate a matter otherwise within the discretion of the States, yet it is not *juridically unconstitutional*, because it is an exercise of an undoubted power to impose a tax; and the motives and objectives of the tax are within that broad field of political discretion into which the judiciary is powerless to enter. To use Madison's phrase, it is an "extra-judicial" question and as such beyond the power of the court.

VIII.

Remedy is With The People.

I recognize that this doctrine, carried to its logical conclusion, could, if Congress should utilize *all* its great powers to accomplish ulterior ends, go far to subvert our form of government. To that possibility I can not be blind; but, nevertheless, the remedy is not with the judiciary, but with the people.

The belief that the judiciary is fully empowered to sit in judgment upon the motives or objectives of other branches of the Government is a mischievous one, in that it so lowers the sense of constitutional morality among the people that neither in the legislative branch of the Government nor among the people is there as strong a purpose as formerly to maintain their constitutional form of Government.

Let this Court clearly say that in this broad field of political discretion there is no revisory power in the Judiciary, and that the remedy must lie in the people, then, if there be any longer a sufficient sense of constitutional morality in this country, the people will themselves protect their Constitution.

The erroneous idea that this court is the sole guardian and protector of our constitutional form of government has inevitably led to an impairment, both with the people and with their representatives, of what may be called the constitutional conscience.

It is the common belief that groups of men can agitate for any kind of a law, without considering its constitutional aspects; for, if it be unconstitutional in substance or in motive, the Supreme Court will avert the evil of its enactment. This indifference to our form of government, which is now so widely prevalent, has its reflex action upon the representatives of the people, both in the legislatures of the States and of the Nation. When laws are discussed which go to the verge of constitutional power, the principal, and sometimes the only, discussion is that

of policy, while the effect of such legislation upon our constitutional form of government is given little attention. The prevalent disposition seems to be to ignore constitutional questions by shifting them to the Supreme Court, in the belief that that court will exercise the full powers of revision, which I have tried to show the Framers of the Constitution did not intend this court to have. The result may be an exaltation of this court, as a tribunal of extraordinary power; but, in the matter of constitutionalism, it inevitably leads to an impairment of the powers and duties of Congress and, above all, to the impairment of the popular conscience; for, in the last analysis, the Constitution will last in substance as long as the people believe in it and are willing to struggle for it.

No one recognized this better than the Father of his Country, to whom, above all men, the Constitution owes its existence. Writing to his friend and comrade in arms, Lafayette, on February 7, 1788, Washington, in speaking of the merits of the new Constitution, said:

> These powers are so distributed among the legislative, executive, and judicial branches into which the Government is arranged that it can never be in danger of degenerating into a monarchy, an oligarchy, or an aristocracy, or any other despotic or oppressive form, *so long as there shall remain any virtue in the body of the people.* I would not be understood, my dear Marquis, to speak of consequences which may be produced in the evolution of ages by corruption of morals, profligacy of manners,

> and listlessness for the preservation of the natural and inalienable rights of mankind, nor of the successful usurpations that may be established at such an unpropitious juncture upon the ruins of liberty, however providentially guarded and secured, as these are contingencies against which no human prudence can effectively provide.

In this connection, it may be questioned that, however beneficent constitutional limitations themselves are in restraining the possible tyranny of the majority, yet constitutional limitations do not, in one respect, tend toward the preservation of constitutional liberty, for they weaken the vigilance of the people in preserving such liberty. It may be questioned whether, in countries like England, where Parliament is omnipotent, there is not a keener sense to defeat legislation which offends the fundamental decencies of liberty than in this country, where the people place their dependence upon the constitutional limitations and their reliance upon the judiciary to enforce them. England and Canada have no constitutional limitations which forbid the taking of property without due process of law; and yet the constitutional conscience in both their legislatures is sufficiently keen to defeat any law which offends the great principles of Magna Charta.

In this country, however, confiscatory legislation is freely passed, without much consideration of its oppressive features, because of the belief that, in every case, the Supreme Court will come to the rescue.

All this means a lessened spirit among the people of that eternal vigilance which is said to be the "price of liberty." The results of this decay of what Grote called "constitutional morality" were never better stated than by de Tocqueville in his remarkably prophetic book:

> The species of oppression by which democratic nations are menaced is unlike anything which ever before existed in the world. * * * Above this race of men stands an immense and tutelary power, which takes upon itself alone to secure their gratifications and to watch over their fate. That power is absolute, minute, regular, provident, and mild. It would be like the authority of a parent, if, like that authority, its object was to prepare men for manhood; but it seeks, on the contrary, to keep them in perpetual childhood. * * * After having thus successively taken each member of the community in its powerful grasp and fashioned them at will, the supreme power then extends its arm over the whole community. It covers the surface of society with a net work of small, complicated rules, minute and uniform, through which the most original minds and the most energetic characters can not penetrate, to rise above the crowd. The will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting; such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies

> a people, till each nation is reduced to be nothing better than a flock of timid and industrious animals, of which the government is the shepherd. (De Tocqueville, Democracy in America, Vol. II, pp. 332–333; "The World's Great Classics" Edition.)

Unless the people themselves awaken to the fact that they themselves must defend and preserve their own institutions, and not rely wholly upon this court as a tutelary guardian, then that situation will come to pass which Shakespeare, although not a jurist or statesman, but only a philosophic poet, so well stated in one of the least known of his plays:

> Force should be right; or, rather, right and wrong,
> (Between whose endless jar justice resides)
> Should lose their names, and so should justice too.
> Then every thing includes itself in power,
> Power into will, will into appetite;
> And appetite, an universal wolf,
> So doubly seconded with will and power,
> Must make perforce an universal prey,
> And last eat up himself.
>
> (Troilus and Cressida, Act I, scene 3.)

JAMES M. BECK,
Solicitor General.

ROBERT P. REEDER,
Special Assistant to the Attorney General.

FEBRUARY, 1922.

APPENDIX.

THE STRUGGLE IN FRANCE BETWEEN THE LEGISLATIVE AND THE JUDICIAL POWER.

In the reign of Louis XI, the judiciary assumed an independent organization, somewhat similar to the English Inns of Court. Before the middle of the fourteenth century, the judges were, to some extent, independent, *de jure* as well as *de facto*, and early in the fifteenth century the King did not disdain to appear before the Court, as plaintiff or defendant.

The Courts finally became organized into a High Court of Appeals, two lower Courts of first instance, and a Court having criminal jurisdiction, and it became geographically divided into "Parlements" of the different provinces of France.

The method of administration was that no law proclaimed by the legislature (which was rarely in session) or by the King, who had legislative as well as executive powers, could become a law until it was "registered." If the Courts refused to register the law, the King summoned a *lit de justice* and heard the objections of the judges. A deadlock then frequently ensued. If the King insisted upon the registration of the law, the Courts—meaning thereby both the Bench and the Bar—refused to administer the laws, and thus virtually boycotted the political branch of the Government. If the King was insistent, he could only compel acquiescence of the judiciary by using the Bastile as a court of last resort and consigning the judges to its tender mercies. The collisions between the two were not infrequent.

Thus, in the reign of Francis I, the King concluded The Concordat with the Pope and thus repealed the Pragmatic Sanction; and the judiciary refused for two years to register The Concordat.

Later, the same King published a law on poaching, and the Parlements refused to register it.

About 1590, Henry II attempted to legalize the Inquisition as a political institution, and again the judiciary refused to register it.

Richelieu, in the height of his power, never successfully crushed the power of the Courts.

Mazarin, his successor, at the very time when Cromwell was challenging the supremacy of the Stuarts, attempted to crush the Courts, and there resulted in France the war of the Frond. This was precipitated by the attempt of Mazarin to throw the leading judges into prison. Civil war developed. Paris became an armed camp. Mazarin prevailed, and the "Sun King," Louis XIV, showed his contempt of the judiciary by appearing before the Parlement de Paris booted and spurred, as for the chase, and with a riding whip in his hand, and demanded that the judges register some law which he proposed.

With the passing of the Sun King, the struggle was renewed. In 1753, the King (Louis XV), angered by the power of the Courts, suspended all their proceedings. By unanimous vote, the 158 judges wholly suspended the administration of justice. Thereupon the King imprisoned a number of the leading judges and exiled others; but, after a year of public inconvenience, the exiled judges were restored to power.

Simultaneously with the beginning of our own Revolution, the fight was renewed in France.

In 1771, the King issued a law to compel the peasants to work by conscription. The judiciary refused to register the law.

The crisis culminated in January, 1771, when the King's soldiers knocked at the door of each magistrate and required an immediate answer whether he would open his Court. A few said yes, but many said no. They were immediately banished and their offices confiscated. The King then organized a new Court, which became known as the Maupeou Parlement. This Court had a very short life, and went out of power in general contempt, due to the revelation of its subserviency and corruption in the famous case between Beaumarchais and Goezman.

France then returned to its former independent judiciary, and the fight was renewed. Louis XV promulgated two laws for a stamp and a land tax, and thus the culmination of the constitutional struggle in France, as a similar struggle in the Colonies, turned on the question of taxation. The King summoned the judges before him, and, under threats,

compelled them to register the laws. The judges returned to their Courts and adjudged that the registration was void, as under duress, and canceled it. The King ordered the arrest of some of the judges. The Courts then announced the principle that questions of taxations belonged to the people and demanded the convocation of the States General, the legislative body of France. They also proclaimed the irremovability of the judges and their immunity from arrest. The King at once issued warrants for the arrest of the two leading judges. Believing that they would have immunity, if actually on the Bench, the Court was hurriedly convened, and ordered a permanent session. For 36 hours, the Court remained in session, until the King's soldiers broke into the Palais de Justice and carried the whole Court into custody. The King thereupon organized a new Court, with plenary powers, and disturbances broke out in Paris and many of the provinces of France. To end the crisis, the Prime Minister summoned a meeting of the States General, which had not been in session for over 150 years, and when they met on the 5th of May, 1789—just two years after our own Constitutional Convention—the French Revolution virtually began.

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CHILD LABOR TAX CASE.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 590.

J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, ET AL., APPELLANTS,

vs.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS VIVIAN COTTON MILLS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF ON BEHALF OF APPELLEES.

CAMPBELL B. FETNER,
W. CLEVELAND DAVIS,
Counsel for Appellees.

INDEX.

Cases Cited.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF ON BEHALF OF APPELLEES.

Statement of Case.

This is an appeal by the defendants in the court below from a judgment of the District Court for the Western District of North Carolina, rendered the 22d day of August, 1921, making permanent an injunction issued in the cause.

restraining the Collector of Internal Revenue and his deputies from levying upon and selling the property of the appellees, and holding unconstitutional and void such part of the Federal Revenue Act of February, 1919, as imposes, or seeks to impose, a 10 per cent tax, additional to all other taxes, on the profits arising from the sale or disposition of the products of mines, quarries, mills, canneries, workshops, factories or manufacturing establishments which at any time during the year shall have employed or permitted to work children under the age of fourteen years at all, children between the ages of fourteen and sixteen years for more than eight hours in any day for more than six days in any week, or after the hour of 7 o'clock p. m. or before the hour of 6 o'clock a. m.

This suit was instituted on July 7, 1921, to enjoin the collection of a tax assessed under the law in question, the contention being that the statute is unconstitutional.

The bill, as amended, alleges that the plaintiff John George during the year 1919 manufactured cotton yarns at Cherryville, N. C., under the name of "Vivian Cotton Mills." The property and business had passed to the other plaintiff, the Vivian Spinning Company, before the institution of this suit.

The defendants are the Collector and the Deputy Collector of Internal Revenue for North Carolina.

On November 9, 1920, the Commissioner of Internal Revenue, acting under the provisions of the Child Labor Tax Law, assessed against the plaintiff George and his property, the Vivian Spinning Company, the sum of $2,098.06, due November 19, 1920, with a penalty of 5 per cent per month from the date due until paid, the Commissioner claiming

that during the taxable year 1919 there had been employed in the Vivian Cotton Mills children under the age of fourteen and children between fourteen and sixteen years of age more than eight hours a day, after 7 p. m. and before 6 a. m., contrary to the statute.

The plaintiffs deny violation of the act and aver that the Commissioner advised them to file a claim for abatement of the tax, which claim was duly filed and disallowed, and the Collector was instructed to collect the tax by distraint proceedings. They further allege that, unless restrained, the Collector will sell plaintiffs' property, subjecting plaintiffs to a loss of approximately $50,000, in view of the low state of the market for cotton mills, cotton-mill stocks, and cotton-mill products, and to other great and irreparable damage.

The bill prays that the assessment be declared void and that defendants be enjoined from selling plaintiffs' property, it being alleged in the bill, as amended, that the statute is unconstitutional (1) as depriving plaintiffs of their property without due process of law, in violation of the Fifth Amendment; (2) as denying to them the right to trial by jury, which is guaranteed to them by the Seventh Amendment; (3) as providing for the exercise of a power not delegated to the United States, but reserved to the States and to the people under the Tenth Amendment, and (4) as not constituting a tax measure but an attempted regulation of hours of labor and age of employees, under which a penalty is imposed and enforcement is proposed without giving the petitioners an opportunity to be heard, although they deny liability.

The plaintiffs contend that this assessment against the plaintiffs and subsequent attempted levy was brought about

because of the fact that a deputy collector of internal revenue incorrectly instructed the plaintiffs as to how to make a report to the Commissioner of Internal Revenue (while in fact plaintiffs were not liable to the tax (Record, p. 15).

A temporary restraining order was issued as prayed. Thereafter defendants filed an answer to the bill, denying certain allegations of the bill, but not denying section 9 of the bill, to wit, that should the Commissioner of Internal Revenue be allowed to sell petitioners' property for the purpose of collecting this assessment it would occasion petitioners a loss of approximately $50,000 and a great and irreparable damage and loss would be otherwise inflicted on the petitioners (Record, p. 25).

The defendants also moved to dismiss the case for want of jurisdiction, on the ground that the court was forbidden by Revised Statutes, section 3224, to entertain a suit to restrain the collection of a tax.

The district judge denied the motion to dismiss and made permanent the temporary restraining order. The court held that the Child Labor Tax Law was unconstitutional, as constituting an attempt on the part of Congress, not to collect revenue, but to control the internal affairs of the States.

It further held that a suit to prevent the collection of this tax, which was held unconstitutional, might be maintained, since to permit its collection would be to extend the power of Congress, through taxation, to legislation forbidden by the Constitution, especially the Ninth and Tenth amendments. It also ruled that the statute provided not for a tax but for a penalty to prevent violation of its provisions, which penalty could not be enforced by assessment and distraint, and that therefore a permanent injunction should be granted.

The defendants were allowed a direct appeal to this court.

Statement of Questions Involved.

There are two questions involved in this case.

First Question.

Whether section 1200 of the Revenue Act of 1918, approved February 24, 1919, 40 statutes, chapter 18, page 1138, and known as the Child Labor Tax Law, as hereinbefore set out, is within the constitutional authority of Congress to enact. The case of J. W. Bailey and J. W. Bailey, Collector of Internal Revenue for the District of North Carolina, against Drexel Furniture Company, No. 657, is in this court and by consent and order of court set down for hearing at the same time this case is heard, and involves the constitutionality of the Child Labor Tax Law. The Government has filed a single brief dealing with the questions involved in these two cases. On the question of constitutionality of the Child Labor Tax Law we, with their permission, adopt the brief of the Drexel Furniture Company, defendant in error, and the argument in said brief as the brief and argument of the appellees in this case.

Second Question.

The question of jurisdiction.

The appellants contend that the courts are inhibited from enjoining the assessment and collection of this tax under a warrant of distraint by section 3224 of the Revised Statutes, which provides:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The case of Bailey against Drexel Furniture Company is to be heard with this case, and that case presents the single question of the constitutionality of the Child Labor Tax Law. Therefore the question of jurisdiction in this case becomes purely academic, for the reason that should the court in the Drexel Furniture case find that the Child Labor Tax Law is constitutional the appellees in this case would have to pay the tax. On the other hand if this court should determine that said law is unconstitutional it certainly would not be the policy of the Government to insist that the appellees pay a tax under an unconstitutional law.

However, since the Government has raised the question of jurisdiction, the contentions of the appellees with reference thereto are that the inhibition of section 3224, Revised Statutes, is not applicable in this case because—

(*a*) The tax imposed by the Child Labor Tax Law is not in fact a tax but is a punitive penalty.

(*b*) Even though the court should find that the Child Labor Law imposes a tax this being a case of irreparable injury, the court has jurisdiction.

(*c*) The Child Labor Tax being not for the purpose of raising revenue, but for the purpose of regulating child labor, and no revenue being contemplated by the act, the reason for the application of section 3224, Revised Statutes, fails.

ARGUMENT.

Section 3224, Revised Statutes, is not Applicable to This Case Because the Tax Imposed by the Child Labor Tax Law is not in Fact a Tax, but is a Punitive Penalty.

The plaintiffs in this cause ask for injunctive relief on the specific grounds that the Child Labor Act imposes a penalty or fine.

The amended bill of complaints, paragraph eleven, subsection (*d*) (case on appeal, page 14), alleges:

> "In that, as will appear from the very terms and provisions of the Act itself, it is in no sense a tax measure, intended to raise revenue, but is in fact an attempted regulation of the hours of labor permitted in factories and mines within the several States and the alleged assessment above referred to is in no sense a tax but is in fact equivalent to a fine or penalty imposed upon any manufacturer failing to comply with the attempted regulation of hours of labor and age of employees, and that the said fine or penalty has been imposed on the petitioner, although he is not in fact liable for said fine or penalty and although he has been given no opportunity to be heard."

The great underlying purpose in the enactment of section 3224, Revised Statutes, is that the Government shall not be delayed in the collection of its revenue. This is clear from the decisions wherein the statute has been applied. As interpreted by these decisions, the statute relates to exactions

properly called taxes—that is, exactions for the purpose of raising revenue with which to run the Government.

Barnes *vs.* Railroad, 17 Wall., 307.
Dodge *vs.* Osborne, 240 U. S., 118.
Dodge *vs.* Brady, 240 U. S., 122.

The Child Labor Law does not levy a tax within the meaning of that term. Its purpose is not to raise revenue with which to run the Government. Looking only at the statute itself one must conclude that it is more in its direct and necessary result—in its natural and reasonable effect—a regulation of the hours of labor permitted in factories and mines. It is not a tax at all, but is an attempt by Congress to exert a power as to a purely local matter, to which the Federal authority does not extend.

A careful consideration of the provisions in detail of the statute verifies the first impression that it is not a taxing measure at all, but a simple Congressional regulation of hours of labor and of the age of wage earners, a subject now regulated by the State of North Carolina by a criminal statute (Public Laws N. C., 1919, ch. 100).

The violation of the State act is made a criminal offense and is punishable by fine or imprisonment or both, in the discretion of the court.

A tax is defined as "an enforced contribution for the payment of public expenses." That in Houck *vs.* Little River Drainage District, 239 U. S., 254, and again in N. J. *vs.* Anderson, 203 U. S., 483, 492, the court defines a tax as follows:

> "Generally speaking a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government."

Ordinarily a tax is understood to be a charge enforced by legislative power upon person, property, or privilege to raise money for public purposes.

In the light of this definition, let us test the "so-called tax" in question, and in doing so let us remember that names are not controlling.

Clearly the "tax in question" is not levied upon person nor upon property. Is it, then, a privilege tax? Would a reasonable mind, upon reading the statute, conclude that Congress meant to collect the tax upon the theory that it was extending to the manufacturer the privilege of employing children under the prohibited age?

It is significant that when the tax is paid no license is granted.

In McBride *vs.* Adams, 70 Miss., 746; 12 Southern, 699, the court said:

> "We have held and must always hold that the State may not by mere legislative declaration create a right and execute it by its executive officer, and we must decide that so much of sec. 1590 of the Code of 1892, as authorizes the sheriff and revenue agent to assess and collect by distress the penalty thereby imposed is violative of art. 3, sec. 14, of the Constitution. The penalty prescribed is not a tax and cannot be made one by the mere authority to assess it as such."

There are a number of cases arising under the Volstead Act which we submit fully support the present action. In the cases referred to, a collector of internal revenue was seeking by distress proceedings to collect the penalty or tax imposed by the Volstead Act and was enjoined.

Thorne *vs.* Lynch, 269 Federal, 995.

Accardo *vs.* Fontenst, 269 Fed., 447.

Kaush *vs.* Moore, 268 Fed., 668

In each of these cases the contention that sec. 3224, Revised Statutes, applied was unsuccessfully advanced, the court holding that the proper method of collection of the penalty was by suit in the District Court, as provided by law.

That no revenue was intended to be raised by the Child Labor Act, but that it was intended to exert a power as to a purely local matter, to which the Federal authority did not extend and to penalize or fine the manufacturer for his failure to comply with the will of Congress is shown by the discussion in the Senate of this matter.

Senator Lodge, favoring the provision, says:

> "The amount of revenue to be raised by this measure may be little or nothing. The main purpose is to put a stop to what seems to be a very great evil and ought to be in some way put a stop to." (*Congressional Record*, vol. 57, p. 619.)

Senator Simmons said:

> "I do not know what the members of the committee expected, but I have heard no one suggest any revenue would be raised by it. My individual judgment is no revenue will be raised by it." (*Ibid.*, p. 620, *Congressional Record*.)

Senator Kenyon said:

> "Now that the Supreme Court in the original child labor case has decided that the law is unconstitutional, it seems to be perfectly proper and perfectly right that we should try to find some means of nullifying that action of the Supreme Court, and that is what we are trying to do. Here the Supreme Court decided that an attempt through the interstate commerce clause to regulate this wrong was an unconstitutional way to

get at it. Now we will try another way, and pass that on to the Supreme Court for them to state whether or not it is constitutional legislation." (*Ibid.*, p. 626.)

Hammer *vs.* Dagenhardt, 247 U. S., 251, which case declared unconstitutional the Child Labor Law of 1916, which act prohibited the shipment in interstate or foreign commerce of any product of a mill situated in the United States in which, at any time during the period of thirty days before the removal of the product, children of certain ages had been employed in the manufacturing establishment; the act was declared unconstitutional as exceeding the power of Congress and as invading the power reserved to the State. The court decided that when the purpose of an act of Congress is to exert a power as to a purely local matter to which the Federal authority does not extend, to wit, to regulate the hours of labor of children in factories and mines within the States, the act will be declared void as exceeding the authority granted by the Constitution and as invading the power reserved to the State

The Dagenhardt case is also authority for this proposition, that when the purpose and effect of an act necessarily appears from a consideration of the act itself and the sources open to the court to consider, the court will go behind the form to the substance of the act.

The propositions laid down in the Dagenhardt case should apply equally to all grants of power under the Constitution, including the power to tax, unless, forsooth, there are no constitutional barriers against the powers of taxation, and Congress may be allowed under the guise of taxation to exert any influence upon matters purely local, at the congressional

will, and those affected are to be deprived of their ordinary remedies and rights in courts of justice.

This (Child Labor) statute, being a criminal or penalizing statute over matters of which Congress has no control, it is condemned by the principles announced by this court in cases in which taxing statutes have been upheld.

> "* * * When it was plain to the judicial mind that the power had been called into play * * * not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, then it would be the duty of the court to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred" (McCray case, 195 U. S., 27, 64).

Is the act for the purpose of raising revenue? The discussion in the Senate of this section of the act, page 9, *supra*, shows that there was no revenue contemplated by this section.

There was in fact no revenue raised by the law. From April 20, 1919, to June 30, 1921, the Internal Revenue Department, with an average staff of fifty employees, collected the gross sum of $26,603.87. If it be assumed that the employees received average annual salaries of $2,000, this has been at an expense of over $200,000. In other words, they have collected approximately one-tenth of the amount necessary to pay the expenses of collecting the "tax."

There was no revenue contemplated and no revenue raised. Is it not "plain to the judicial mind that the power (*power to tax*) had been called into play * * * not for

revenue?" Is it not "plain to the judicial mind" that the act is "solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the constitution rests."

In the words of Boyd, D. J., in the case below (274 Fed., 639):

> "By the Constitution the Federal Government is invested with power by Congressional Legislation, 'To levy and collect taxes, duties, imposts, and excises, to pay the debt and provide for the common defense and general welfare of the U. S..' But nowhere in the Constitution can be found authority to the National Government to regulate labor within the States."

The 10th Amendment to the Constitution reads:

> "The powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The rights of the States and of the people are fortified by the Ninth Amendment.

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

What rights were retained by the people? The rights to regulate their own local conditions, their own internal affairs, chiefly among which is the hours of labor and labor conditions within the State. Then, in the language of the court (McCray case, *supra*), "Such an arbitrary act (*is*) not

merely an abuse of a delegated power, but (*is an*) exercise of an authority not conferred." (Italics ours.)

If in "an exercise of an authority not conferred" Congress sees fit to penalize or fine a manufacturer for a violation of the Congressional will, and to place such an act in a revenue statute, then, forsooth, is the manufacturer to be denied the remedies which should be open to him ordinarily because Congress saw fit to place such act in a revenue statute? We respectfully submit that such cannot be the law of the land.

If this is a tax, it must be a privilege tax, and yet it neither bears any proportion to the extent to which the privilege is enjoyed, nor does the payment of the tax give to the manufacturer the privilege. The brief of the Government in the Dagenhardt case avers "that the employment of child labor was morally repugnant and socially unwise." This "morally repugnant" conduct is now converted into a privilege, and to enjoy this "morally repugnant" privilege the manufacturer pays 10 per cent on his net profits. The object and purpose of the act is to operate as a deterrent, just as any other criminal act which is "morally repugnant," but the sad, sad story in connection with this criminal statute, "A bill to raise revenue," is that the accused is given no trial, civil or criminal, and is tried, sentenced, and financially executed by one and the same person, to wit, the Commissioner of Internal Revenue, and if the Government's contention is true, that section 3224, R. S., applies, then all of this is done without any recourse to the courts of justice until the financial execution is completed.

It is significant that under section 1203 of this act, if the manufacturer in good faith employs a child under a mistake of fact as to the age of such child, the tax shall not be im-

posed. In other words, the lack of scienter is a defense to the tax, just as it is a defense to nearly every penalty for crime.

It will be noted that in paragraph six of the bill (Record, page 2) the petitioner alleges that he had not employed children of such age or at such hours as to render the statute applicable, and in paragraph eight (Record, page 3) that he has been given no trial, either civil or criminal.

Under the provisions of section 3213 of Revised Statutes, the Government could institute a suit for the collection of any amount due by the plaintiff under the statute in question. Surely such a course would be more in harmony with fundamental principles than the very drastic one adopted in this case.

It will be noted that the act itself does not expressly provide for a collection of tax by a warrant of distraint. In the absence of such provision the usual method of collecting a penalty is by suit or other appropriate proceedings in court.

22 Cyc., 1680; 30 Cyc., 645.

Less *vs.* The U. S., 150 U. S., 479.

Even Though the Court Should Find That the Child Labor Law Imposes a Tax, This Being a Case of Irreparable Injury, the Court Has Jurisdiction.

Notwithstanding the inhibition of section 3224, Revised Statutes, the courts hold that the collection of the tax should be restrained if the enforcement of the tax would produce irreparable injury, or under other circumstances justifying equitable relief.

In Allen *vs.* B. & O. Railroad Co., 114 U. S., 311, and other Virginia coupon cases, where Allen was Auditor of

Public Accounts of Virginia, and Hamilton Treasurer of Augusta County in that State. The Auditor had assessed certain railroads upon their real estate, not having any rolling stock, as being in default for non-payment of taxes assessed by the Board of Public Works, and had placed a copy of the assessment in the hands of the defendant Hamilton, as Treasurer of Augusta County, for collection, in pursuance of which he had levied on certain cars and locomotives belonging to the complainant and threatened to make further levy upon other cars and engines and sell them for payment of said taxes, and the bill prayed for an injunction upon the several grounds of irreparable damage, avoidance of multiplicity of suits, and removal of cloud upon title. The court, held that this made a case of irreparable injury, and that injunction would lie.

In Cummings *vs.* Merchants National Bank, 101 U. S. 153, jurisdiction of restraining order was maintained upon the ground of preventing multiplicity of suits.

In Poindexter *vs.* Greenhow, 114 U. S., 270, an action of detinue brought by Poindexter, a taxpayer, against Greenhow, Treasurer of Richmond, Virginia, for a desk belonging to plaintiff seized for the purpose of raising the tax claimed to be due from plaintiff after he had tendered coupons in payment thereof in pursuance of the Virginia Act of 1871, making the coupons receivable for taxes. In 1882, Virginia passed an act providing that, in case of proceeding instituted against a taxpayer for the collection of his tax notwithstanding his tender of coupons in payment thereof, he should pay the taxes under protest in lawful money, and then sue the officer for the amount, and provided further that no writ of injunction should be issued to hinder or delay the collection

of the tax. In this case the court held that the acts of 1882 were unconstitutional so far as they deprived the taxpayer of his remedy by detinue after tendering receivable coupons in payment of the taxes.

Even in the cases in which equitable relief was not granted in efforts to enjoin the assessment or collection of taxes the Supreme Court of the United States has, without exception, recognized the doctrine that in cases of irreparable injury the assessment or collection of the tax should be enjoined.

In the State Railroad Tax cases, 92 U. S., 575, a case frequently cited in later cases as an authority in support of the position that an injunction should not lie for restraining assessment or collection of taxes, on page 614, says:

> "In this latter case (Dow *vs.* Chicago, 11 Wall., 108) this court, after commenting upon the necessary reliance of the State governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says: 'No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary process of law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked.'"

So in the case of Hannewinkle *vs.* Georgetown the court says:

> "It has been the settled law of this country for a great many years, that an injunction bill to restrain

> the collection of a tax on the sole ground of the illegality of the tax cannot be maintained. There must be an allegation of fraud, that it throws a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause of presenting a case of equity jurisdiction."
>
> 15 Wall., 548.

And the court, in the State Railroad cases, continued:

> "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction."

In Shelton *vs.* Platt, 139 U. S., 273, which was an injunction to restrain the collection of certain license taxes imposed upon the U. S. Express Company in Tennessee, the defendants filed a plea in abatement, setting up an act to facilitate the collection of revenue approved by the Legislature of Tennessee March 21 1873, and insisted that in accordance with its terms complainant's only remedy was to pay under protest the taxes complained of, and then sue within thirty days thereafter for a recovery of the amount so paid; and no injunction or other restraining order or writ to prevent the collection of said taxes would lie. Section 2 of said act provides:

> "No writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same, shall in any wise issue, with injunction, supersedeas, prohibition or any other writ or process whatever."

Mr. Chief Justice Fuller delivered the opinion of the court and, on page 275, said:

> "A suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal, but that there must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant."

And again, on page 276, the court, in Shelton *vs.* Platt, citing from Cooley on Taxes, page 536, says:

> "Cases of fraud, accident, or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these in proper cases may be afforded in the courts of equity."

In the case of Shelton *vs.* Platt the court denied the right of injunction because of the failure to allege irreparable injury. There was no allegation of inability on the part of the express company to pay the amount of the taxes claimed, nor any averments showing that the seizure and sale of the particular property which might be levied on would subject it to damage and inconvenience which would be in their nature irremediable. The bill showed the Company to be doing a vast business.

In paragraph 9 of the petition in this cause (Record, page 3) these complainants allege:

> "That the market for cotton mills and cotton mill stock and cotton mill products is unusually low, and that there is practically no market for the same now, and should the said Commissioner of Internal Revenue be allowed to sell your petitioners' property for the purpose of collecting this illegal assessment that it would occasion your petitioners a great loss of approximately $50,000 and a great and irreparable damage and loss would be otherwise imposed upon your petitioners."

The defendants in their answer do not deny the allegation in paragraph nine of the petition.

Again, in section 7 of the petition, the plaintiffs allege (Record, page 3) that said deputy or deputies will levy on and sell the real and personal property of your petitioners thereunder for the collection of said wrongful assessment, unless said Commissioner of Internal Revenue and said deputies are restrained by order of this honorable court.

In section 7 of the answer (Record, page 25) the defendants admit the allegations contained in paragraph 7 of the bill.

It not being denied that the market for cotton mills and cotton-mill stock and cotton-mill products was unusually low; that there was practically no market for the same at the time of the institution of this suit, and that if the Commissioner of Internal Revenue, should he be allowed to sell petitioners' property, would occasion petitioners a great loss, of approximately $50,000, and would inflict other great and irreparable damage and loss upon the petitioners, and it being further admitted that the Collector of Internal Revenue or his deputies would have sold the property of the

petitioners unless restrained by the court, and it not being denied that such sale would occasion the petitioners irreparable damage, it must necessarily follow from said allegations and admissions that the petitioners were unable to pay the tax in question at the time of the institution of this action. It not being denied that the market for cotton mills and cotton-mill products was unusually low, there being practically no market at the time of the institution of this action, it must necessarily follow that a sale of the petitioners' property under such circumstances would cause a damage which would be irreparable and hard to estimate.

Under the allegations and admissions above set forth and in view of the authorities above cited, we maintain that this is a case in which the courts, as courts of equity, may enjoin the collection of the tax in spite of the inhibition of section 3224, Revised Statutes.

The case of Snyder *vs.* Marks, collector, 109 U. S., 189, is one of the cases relied upon by the appellants in this cause. In this case there was no allegation of irreparable damage or other equitable application such as to bring the case within any of the exceptions, and the court properly held that Snyder was inhibited by section 3224, Revised Statutes, from restraining the assessment and collection of a tax.

The case of Cheatham *vs.* U. S., 92 U. S., 561, is a case relied upon by appellants as an authority, but a careful reading of this case will disclose that it is a case where Cheatham appealed from an income tax and the Commissioner of Internal Revenue set it aside and ordered another, Cheatham paid the new assessment, and it was held by the court that he could not recover it back because he had not brought suit within six months from the decision of the Commissioner on

his appeal and had taken no appeal from the second assessment. There is nothing in this case relating to the right to restrain the assessment or collection of taxes, but the case deals solely with the question of a suit for a refund of the taxes, which of course is regulated solely by statute.

The State Railroad Tax case, 92 U. S., 575, is another case relied upon by appellants as an authority, but it is noted that in this case there was no allegation that the property of the railroad company would be sold, nor was there allegation of irreparable injury, nor other equitable allegations which would bring this case into an exception that injunction would not lie.

In Dodge *vs.* Osborne, 240 U. S., 118, the other case relied upon by the appellants as an authority that injunction did not lie, the court used this language:

> "It is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstance its provisions are not applicable."

The extraordinary and entirely exceptional circumstances mentioned by the court in Dodge *vs.* Osborne must be those circumstances enumerated by this court in the cases above cited, to wit, irreparable injury, cloud upon title, and multiplicity of suits.

The Child Labor Tax Being Admittedly Not for the Purpose of Raising Revenue But for the Purpose of Regulating Child Labor, and no Revenue Being Contemplated by the Act, the Reason for the Application of Section 3224, Revised Statutes, Fails.

The Government in its brief has the following to say:

> "However, I do not stress this point, for I prefer to add, in the spirit of candor, that there is plausible ground for the contention that the motive of Congress may have been to regulate child labor rather than to raise revenue."
>
> "If so, it is not the first time in the history of taxation that taxes have been imposed for other than fiscal purposes." * * *

The Government in its brief, speaking of the question of jurisdiction in this case, quotes the following from State Railroad Tax cases, 92 U. S., 575, 613:

> "This section has been said by this court to have grown out of the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the Government depends for its continued existence."

It being admitted by the Government, "in the spirit of candor," that the motive of Congress is to regulate child labor rather than to raise revenue, and that this tax is imposed for other than fiscal purposes, and it being shown by the Government that this act (section 3224, Revised Statutes) has grown out of the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the Government

depends for its continued existence, it must necessarily follow that section 3224, Revised Statutes, does not apply to this case, as the reason for the act fails, taking the Government's own position and own authorities as to the same.

THE JUDGMENT OF THE DISTRICT COURT IS RIGHT AND SHOULD BE AFFIRMED.

CAMPBELL B. FETNER,
W. CLEVELAND DAVIS,
Counsel for Appellees.

No. 599.

In the Supreme Court of the United States.

October Term, 1931.

J. W. BAILEY, Collector of Internal Revenue, Etc., et al., Appellants,

v.

JOHN J. GEORGE, Etc., et al., Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

MOTION TO ADVANCE.

(WASHINGTON, GOVERNMENT PRINTING OFFICE, 1932)

In the Supreme Court of the United States

OCTOBER TERM, 1921.

J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, etc.
v.
JOHN J. GEORGE, ETC., ET AL.
No. 590.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

MOTION TO ADVANCE.

The Solicitor General moves the court to advance the above-entitled cause for hearing on January 9, with the cases *J. W. Bailey et al.* v. *Drexel Furniture Company*, No. 657 (in which a motion to advance is now pending before the court); with the case of *Atherton Mills* v. *Johnston*, No. 16 (recently passed under the 26th Rule), and with the case of *Hill et al.* v. *Wallace, Secretary of Agriculture, et al.*, No. 616, now assigned for hearing on January 3, not as one case, but consecutively.

The case of *Bailey, Collector*, v. *George*, like the case of *Bailey, Collector*, v. *Drexel Furniture Company*, involves the question of the constitutionality of Title XII of the revenue act of 1918, being section

1200 et seq. of chapter 18 of the act of Congress approved February 24, 1919, known as the "Child labor tax act" (40 Stat. 1138), and bears a substantial similarity, except on the facts, to that involved in *Hill* v. *Wallace*. It is believed that the time of the court will be conserved by having the cases heard at the same time.

Counsel concerned agree to this motion.

JAMES M. BECK,
Solicitor General.

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BAILEY, COLLECTOR OF INTERNAL REVENUE, ET AL. *v.* GEORGE, TRADING AND DOING BUSINESS AS VIVIAN COTTON MILLS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

No. 590. Argued March 7, 8, 1922.—Decided May 15, 1922.

A bill to enjoin a levy and sale of property to satisfy a penalty prescribed as a tax by an unconstitutional act of Congress, will not lie, in face of the inhibition of Rev. Stats., § 3224, when it sets up no extraordinary circumstances rendering that section inapplicable and exhibits no reason why the legal remedy of payment under protest and action to recover would not be adequate. P. 19.

274 Fed. 639, reversed.

APPEAL from a decree of the District Court permanently enjoining a collector and his deputy from collecting an assessment under the Federal Child Labor Tax Law. See also *Child Labor Tax Case, post,* 20.

Mr. Solicitor General Beck, with whom *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, was on the brief, for appellants, attacked the jurisdiction of the lower court, citing Rev. Stats., § 3224, and contending that the imposition in question was a tax within the meaning of that section, whether unconstitutional or not;

that there were no extraordinary circumstances justifying interposition in equity, and that the policy of the law confined the remedy to an action for refund.

Mr. W. Cleveland Davis and *Mr. Campbell B. Fetner* for appellees.

The purpose of § 3224, Rev. Stats., is that the Government shall not be delayed in the collection of its revenue. The statute relates to exactions properly called taxes—that is, exactions for the purpose of raising revenue with which to run the Government. *Barnes* v. *The Railroads*, 17 Wall. 307; *Dodge* v. *Osborn*, 240 U. S. 118; *Dodge* v. *Brady*, 240 U. S. 122.

The Child Labor Law does not levy a tax within the meaning of that term. Its purpose is not to raise revenue with which to run the Government. Looking only at the statute itself one must conclude that it is more in its direct and necessary result—in its natural and reasonable effect—a regulation of the hours of labor permitted in factories and mines. It is not a tax at all, but is an attempt by Congress to exert a power as to a purely local matter, to which the federal authority does not extend. *Houck* v. *Little River Drainage District*, 239 U. S. 254; *New Jersey* v. *Anderson*, 203 U. S. 483, 492.

Clearly the tax in question is not levied upon person nor upon property. Is it, then, a privilege tax? Would a reasonable mind, upon reading the statute, conclude that Congress meant to collect the tax upon the theory that it was extending to the manufacturer the privilege of employing children under the prohibited age? *McBride* v. *Adams*, 70 Miss. 716. See *Thorne* v. *Lynch*, 269 Fed. 995; *Accardo* v. *Fontenst*, 269 Fed. 447; *Kaush* v. *Moore*, 268 Fed. 668.

That no revenue was intended to be raised by the Child Labor Act, but that it was intended to exert a power as to a purely local matter, to which the federal authority

did not extend and to penalize or fine the manufacturer for his failure to comply with the will of Congress, is shown by the discussion in the Senate. 57 Cong. Rec. 619, 620, 626.

The propositions laid down in *Hammer* v. *Dagenhart*, 247 U. S. 251, should apply equally to all grants of power under the Constitution, including the power to tax, unless, forsooth, there are no constitutional barriers against the powers of taxation, and Congress may be allowed under the guise of taxation to exert any influence upon matters purely local, at the congressional will, and those affected are to be deprived of their ordinary remedies and rights in courts of justice.

This Child Labor statute being a criminal or penalizing statute over matters of which Congress has no control, it is condemned by the principles announced by this court in cases in which taxing statutes have been upheld. *McCray* v. *United States*, 195 U. S. 27. No revenue was contemplated and none raised.

It will be noted that the act itself does not expressly provide for a collection of a tax by a warrant of distraint. In the absence of such provision, the usual method of collecting a penalty is by suit or other appropriate proceedings in court. 22 Cyc. 1680; 30 Cyc. 645; *Lees* v. *United States*, 150 U. S. 479.

Notwithstanding the inhibition of § 3224, the courts hold that the collection of the tax should be restrained if the enforcement of the tax would produce irreparable injury, or other circumstances justify equitable relief. *Allen* v. *Baltimore & Ohio R. R. Co.*, 114 U. S. 311; *Cummings* v. *National Bank*, 101 U. S. 153; *Poindexter* v. *Greenhow*, 114 U. S. 270. See also, *State Railroad Tax Cases*, 92 U. S. 575, 614; *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *Shelton* v. *Platt*, 139 U. S. 591.

The petition alleges that a forced sale now would produce irreparable loss, because of depressed market con-

ditions. Under this and other allegations and admissions, this is a case in which a court of equity may enjoin the collection of the tax in spite of § 3224. *Snyder* v. *Marks*, 109 U. S. 189; *Cheatham* v. *United States*, 92 U. S. 85; *State Railroad Tax Cases*, 92 U. S. 575; *Dodge* v. *Osborn*, 240 U. S. 118.

The Child Labor Tax being admittedly not for the purpose of raising revenue but for the purpose of regulating child labor, and no revenue being contemplated by the act, the reason for the application of § 3224 fails.

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

The decree entered herein by the District Court and appealed from, directly, to this court, under § 238 of the Judicial Code, recited that the complainants operated a manufacturing plant for the production of cotton goods in Gaston County, North Carolina; that the defendant was a Federal Collector of Internal Revenue; that on the ground that complainants had employed children in their factory within the limits of ages prescribed in § 1200 of the act of Congress, known as the Child Labor Tax Law, approved February 24, 1919, c. 18, 40 Stat. 1057, 1138, they were under its terms assessed the sum of $2,098.06; that they filed a claim for abatement of the same, which was denied, that the Collector was about to make the exaction by distraining complainants' property, levying on it and selling it, that the act of Congress purporting to authorize the assessment was invalid under the Constitution of the United States, and on these grounds permanently enjoined the Collector from proceeding to collect the assessment.

An examination of the bill shows no other ground for equitable relief than as stated in the order. The bill does aver "That these your petitioners have exhausted all legal remedies and it is necessary for them to be given

equitable relief in the premises"; but there are no specific facts set forth sustaining this mere legal conclusion. Section 3224, Rev. Stats., provides that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The averment that a taxing statute is unconstitutional does not take this case out of the section. There must be some extraordinary and exceptional circumstance not here averred or shown to make the provisions of the section inapplicable. *Dodge* v. *Brady*, 240 U. S. 122, 126. In spite of their averment, the complainants did not exhaust all their legal remedies. They might have paid the amount assessed under protest and then brought suit against the Collector to recover the amount paid with interest. No fact is alleged which would prevent them from availing themselves of this form of remedy.

The decree of the District Court is reversed and the cause remanded with directions to dismiss the bill.

Reversed.